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28  
X PROCEEDINGS<sup>2</sup>

OF THE

# American Society of International Law

AT ITS

SEVENTH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 24-26, 1913

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FOR THE YEAR 1913-1914.

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CONSTITUTION  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW.<sup>1</sup>

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ARTICLE I.

*Name.*

This Society shall be known as the AMERICAN SOCIETY OF INTERNATIONAL LAW.

ARTICLE II.

*Object.*

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III.

*Membership.*

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the publications issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled

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<sup>1</sup>The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting, at p. 23.

The Constitution was adopted January 12, 1906.

to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

#### ARTICLE IV.

##### *Officers.*

The officers of the Society shall consist of a President,<sup>2</sup> nine or more Vice-Presidents, the number to be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, who shall be elected annually, and of an Executive Council composed of the President, the Vice-Presidents, *ex officio*, and twenty-four elected members, whose term of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all the offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers of the first year shall be nominated by a committee of three appointed by the Chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

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<sup>2</sup>See Amendments, Article I, p. x.



## ARTICLE V.

*Duties of Officers.*

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programmes therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

## ARTICLE VI.

*Meetings.*

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

## ARTICLE VII.

### *Resolutions.*

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

## ARTICLE VIII.

### *Amendments.*

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

## AMENDMENTS.

### ARTICLE I.<sup>3</sup>

Article IV is hereby amended by inserting after the words "The officers of the Society shall consist of a President," the words "an Honorary President."

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<sup>3</sup>This amendment was adopted at the business meeting held April 24, 1909.

**SEVENTH ANNUAL MEETING**  
**OF THE**  
**AMERICAN SOCIETY OF INTERNATIONAL LAW**  
**NEW WILLARD HOTEL, WASHINGTON, D. C.**  
**APRIL 24-26, 1913**

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**FIRST SESSION**

**Thursday, April 24, 1913, 8 o'clock p.m.**

The meeting was called to order by Mr. James Brown Scott, Recording Secretary of the Society, in the absence of its President, Honorable Elihu Root.

**THE CHAIRMAN.** Ladies and Gentlemen: While it is a very great pleasure to welcome the members of the American Society of International Law to the Seventh Annual Meeting, I am sure we deeply regret Mr. Root's absence and especially the personal bereavement which has caused it. At his request, I have called the meeting to order, and it is likewise at his request that I read a brief summary of international events, before passing to his presidential address, which he has asked me to deliver.

If we were to judge the year which has passed since our last meeting by what would be considered as the most important events, we should have to chronicle two wars: the war between Italy and Turkey, which had barely ended before a much more serious war broke out between Turkey and the Balkan States, which has threatened from time to time to involve the great Powers of Europe. But, however much we may regret the wars, we are happy to state that peace was concluded between Italy and Turkey at Lausanne on October 18, 1912, by the terms of which Italy retains Tripoli and Cyrenaica, the desire to acquire which led to the war which was declared on September 29, 1911. There is no express conveyance of the African provinces. Their acquisition is regarded, to use a diplomatic expres-

sion, as a *fait accompli*; but it is hoped that the Treaty of Lausanne has removed all outstanding differences between the two countries.

Before, however, the Italian war was ended and the treaty signed, war had unfortunately broken out in the Balkans in the month of October, 1912, between Bulgaria, Servia, Montenegro, and Greece, on the one hand, and their one-time master and oppressor, Turkey, on the other. Without examining at this time the causes of the war and without considering whether it might have been averted, it is clear that whatever may have been the pretext alleged by the Balkan allies, namely, the failure to carry out administrative reforms in Turkey, its real cause was undoubtedly the desire to put an end to centuries of oppression, which the Balkan peoples had suffered at the hands of the Turks. The sudden and unexpected victories of the allies led to the belief, unjustified by the event, that the war would end almost as quickly as it had begun. A conference between representatives of the belligerents met in London at the instance of the great Powers, in December, 1912, but failed to agree upon terms of peace, owing chiefly to the demand of the allies for the cession of Adrianople. This the Turks were either unwilling or unable to grant. The conference adjourned and the war was renewed. At present all parties have accepted the mediation of the great Powers, and it is hoped and believed that a treaty of peace acceptable to all will shortly be arranged.

If these two wars are, as they must be, distressing to friends of peace, there is fortunately not wanting evidence that the peaceful settlement of international disputes is slowly but surely displacing the resort to arms between nations, for in the year 1912 two cases were decided by temporary tribunals formed from the list of judges composing the so-called Permanent Court of Arbitration of The Hague, and a third case is being argued as we meet here in Washington.

The first case—decided May 3, 1912—to which reference is made, was between Italy and Peru, and turned upon the question whether the brothers Canevaro were entitled to the amount of money they claimed, and whether one of the brothers was to be considered an Italian subject or a Peruvian citizen. Unimportant as to the principles of law involved, it is important as a step in the growth of the habit of submitting disputes to The Hague.

The second case, between Russia and Turkey, was decided November 11, 1912, and is important for three reasons: (1) the parties

to it; (2) the principles of law involved; (3) the opinion. The question was whether Turkey was responsible for interest on delayed payments on the indemnities due Russian subjects for damages suffered by them in the war of 1877-78. The tribunal held that Turkey was not so liable, but in reaching the decision, which was unanimous, the court applied principles of law, cited decisions of courts of arbitration as precedents, and drew up its opinion in the form to which we are accustomed instead of adopting the labored and artificial system of French procedure heretofore used. The opinion in this case is a model, at once scientific and judicial. There is not a trace of compromise to be found in it.

The third case is between France and Italy, and arises out of the capture of three French vessels, the *Carthage*, the *Manouba*, and the *Tavignano*, by Italian authorities during the recent war between Italy and Turkey. The special agreement submitting these cases to arbitration was concluded in March and November, 1912, and the opening session was held on March 31, of the present year. It is expected that the argument will be completed in the month of April.

In addition to these three cases, there are two arbitrations of a special nature, which are scheduled to take place in the near future:

(1) Holland and Portugal have very recently—on February 1, 1913—agreed to submit their claims in the Island of Timor to the President of the French Republic.

(2) A special agreement for the submission to arbitration of pecuniary claims outstanding between the United States and Great Britain was signed in 1910, approved by the Senate in 1911, confirmed by an exchange of notes on April 26, 1912. This commission consists of three members: on behalf of the United States, the Honorable Chandler P. Anderson; on behalf of Great Britain, the Right Honorable Sir Charles Fitzpatrick; umpire, Monsieur Henri Fromageot of France. It will meet in Washington in the month of May, 1913. It is a matter of congratulation to the members of the Society that the three commissioners are members of it. Mr. Anderson and Mr. Robert Lansing, agent of the United States, were among the founders of the Society and are editors of the JOURNAL.

In this connection it is important to note that the limitation of armaments, upon which friends of peace have set their hearts, is likely to be seriously considered in the near future. The question of disarmament was, it will be recalled, the reason advanced by the

Czar of Russia for the calling of the First Hague Conference. It was considered by this body without reaching agreement. It was briefly discussed by the Second Hague Conference with the same result, since which time governments have discussed it somewhat, and it has occupied the attention of parliaments. Attention is called to the very important speech in the House of Commons on March 26, 1913, in which the First Lord of the Admiralty, Mr. Winston Churchill, offered on behalf of Great Britain to suspend increase of armaments for one year, if other nations can be persuaded to agree to such suspension.

While changes in the form of government are internal, not international, questions, it is common knowledge that changes of form may, and ordinarily do, affect foreign relations, and it is peculiarly gratifying to us Americans to note the very important and radical change in the form of government which has taken place in China, which will undoubtedly result in the reorganization not merely of China, but the adoption of forms of government more in harmony with the spirit of the age. On February 12, 1912, the Manchu dynasty was overthrown and in the month of March, Yuan Shih Kai was inaugurated as President. A representative parliament was opened on April 8, 1913, and an American citizen, Professor Frank J. Goodnow, has been appointed legal adviser to the committee to draft the republican constitution. In this connection it is interesting to note that the American Government withdrew on March 19th of this year from participation in the Six-Power Loan, which had been under negotiation for several years past.

Passing now to conventions between governments, a number of arbitration treaties have been renewed, including that between France and the United States. Others have been ratified, and a few new agreements concluded. None, however, are important.

A very important agreement was concluded between Great Britain and the United States modifying the recommendations of the tribunal of arbitration which decided the fisheries dispute in 1910. The award decided certain long-standing disputes; the treaty referred to is calculated to prevent controversies regarding the exercise of the fishing liberty. It provides that all future British or Colonial laws regulating the time and manner of fishing shall be submitted to the United States before they go into effect, so that the United States shall have an opportunity of examining them and of objecting to their provi-

sions. If the two governments are unable to agree upon modifications which shall seem desirable to the United States, their reasonableness shall be tested by a mixed commission. Should the mixed commission declare the provision objected to to be unreasonable and inconsistent with the Treaty of 1818, "it shall not be applicable to the inhabitants of the United States exercising their fishing liberties under the Treaty of 1818."

Article II of this very important agreement specifies those portions of the bays upon the Canadian coast within which Americans are not to fish and from which the line of three miles shall be drawn.

The controversy between Germany, on the one hand, and France and Great Britain, on the other, concerning the establishment of a French protectorate in Morocco, which controversy seemed at one time likely to result in war, has fortunately been settled without resort to arms. The agreement between France and Germany was signed on November 4, 1911, but the rights of Spain in Morocco require careful treatment. After prolonged discussion, France and Spain signed a treaty defining the rights of each in Morocco, on November 27, 1912, and the treaty has been recently ratified by each of the contracting countries. The treaty between France and Morocco, establishing the French protectorate, was signed on March 30, 1912, and the understanding subsequently come to with Spain enables France, within the terms of the various treaties, to make its protectorate effective.

Unfortunately, so far as the United States is concerned, a grave dispute has arisen between Great Britain and the United States, concerning the interpretation of the Hay-Pauncefote Treaty of 1901—a subject to be discussed in detail by the Society. The Act of Congress exempted American vessels engaged in the coastwise trade from the payment of tolls. Great Britain objected to the exemption and has requested arbitration.

Another controversy, which is likely to tax the patience of responsible statesmen and strain the good relations between Japan and the United States unless wisely and sympathetically treated, has unfortunately occurred and is the subject of negotiations as we meet here in Washington. The right of aliens, particularly Japanese, to hold land in California, which is not merely a question of law but of policy, is before the legislature of that State. Without venturing to express an opinion while negotiations are, it is understood, in

progress between the Governments of Japan and the United States, it is nevertheless proper to hope that an arrangement will be reached acceptable to both countries.

If, however, treaties of arbitration have been few and unimportant, many international conferences of very considerable proportions have been held during the past year. Among these may be mentioned the Industrial Property Conference in London; the Fourth Central American Conference at Managua, held on January 3, 1912, which resulted in the following agreements: (1) Convention relative to annual reports to future Central American Conferences; (2) Convention for regulating the United Central American Consular Service; (3) Convention for the perfection and security of the telegraph service between the different Republics of Central America; (4) Convention to establish in Central America the service of telegraph and postal drafts; (5) Convention for the improvement of the maritime communications in Central America; (6) Convention for the establishment of international routes of communication; (7) Convention for the establishment of commissions of Central American relations.

The International Literary and Artistic Property Association held its 34th General Assembly at Paris in December, 1912; the 17th Congress of the Interparliamentary Union met at Geneva in September, 1912; the International Prison Congress in Paris in September; the 15th International Congress of Hygiene and Demography in Washington in September; the Institute of International Law held its annual meeting in August at Christiania; the Third International Congress of American Students at Lima in July, 1912; the International Commission of American Jurists met at Rio de Janeiro to prepare draft codes of public and private international law, in June and July, 1912; the first International Technical Congress for the Prevention of Accidents and Injuries to Laborers and for Industrial Hygiene was held at Milan in May, 1912; the International Radio-Telegraph Conference, which resulted in a convention, met at London in June, 1912; the International Congress of Editors met at Berne in June, 1912; the Second International Congress for the Unification of the Law of the Check at The Hague in June, 1912; an international conference for regulating expositions met at Berlin in October, and resulted in an international convention; a conference for the suppression of the opium traffic met at The Hague, Decem-



ber, 1911-January, 1912, resulting in a convention, and a similar conference will be held in June of this year, in order to reach, if possible, a final agreement.

Within the last few months—to be accurate, on October 12, 1912—the American Institute of International Law was founded, in order to create a bond of scientific union between the international lawyers of the Western Hemisphere. The publicists of each American Republic will be represented by five members. National or local societies of international law will be formed in each republic, whose members will be associates of the Institute. The principles of international law and American problems will be studied in the light of general principles, and principles will be developed to decide the problem, if they do not exist, with due regard for the fundamental conceptions of international law.

We wish the Institute well and hope that it may not only popularize international law in all the republics of America, but contribute in no small measure to its development.

It will be interesting to the members of the Society to learn that beginning with January, 1912, the AMERICAN JOURNAL OF INTERNATIONAL LAW has been issued in a Spanish edition, which is widely circulated in Latin America. The ministries of foreign affairs, Latin American diplomats, and distinguished publicists have subscribed for it, so that it appears probable that the JOURNAL in its Spanish form will circulate widely in Latin America.

I regret to announce, in concluding, the death of an honorary member of the Society. The distinguished publicist, Mr. John Westlake, formerly professor of international law at the University of Cambridge, died at his residence in London, on April 14, 1913. He was, as we all know, the author of a standard treatise on private international law and of two small volumes on international law, which are everywhere considered as both masterly and invaluable. He was one of the founders of the *Revue de Droit International et de Législation Comparée*. He was an original member of the Institute of International Law and at the time of his death was its Honorary President. Although eighty-four years of age, he was in the full possession of his faculties and had just completed an edition of Ayala's *De Jure et Officiis Bellicis et Disciplina Militari*, published in the series of the Classics of International Law. A month to the day before his death he wrote a memorandum on one of the phases of the

Panama tolls question, to be read during the proceedings of this Society, in which he took a deep, keen and enlightened interest.

### FRANCIS LIEBER.

ADDRESS OF HONORABLE ELIHU ROOT, *President of the Society.*

#### GENTLEMEN OF THE SOCIETY:

This year, 1913, is the fiftieth anniversary of a very important event in the history of international law—the adoption and enforcement by the American Government of the code of rules governing the conduct of armies in the field, which is known to the American army as General Orders No. 100, of 1863. It happens that, without any intention to create a coincidence, the seventh annual meeting of the American Society of International Law is appointed and we are met here, exactly fifty years after the twenty-fourth day of April, 1863, when President Lincoln promulgated that famous order. It seems appropriate for this Society at this time to celebrate the event by paying honor to Francis Lieber, the author of the instructions embodied in the order.

In the early stages of the American Civil War both parties put into the field immense armies, commanded for the most part by volunteer officers drawn from the ordinary occupations of civil life and quite ignorant of the laws and usages of war. The sources of information were to be found only in scattered text-books and treatises, most of them in foreign languages, few of them readily accessible, and requiring the painstaking and diligent labor of the student to search out rules which were at the best subject to doubt and dispute. It was manifest that the officers of the Union and Confederate armies had neither time nor opportunity to enter upon an extended study of the international laws of war, and that unless some one indicated to these uninstructed and untrained combatants what was and what was not permissible in warfare, the conflict would be waged without those restraints upon the savage side of human nature, by which modern civilization has somewhat mitigated and confined the barbarous cruelties of war. Fortunately, General Halleck, who was put in chief command of the Union army in July, 1862, was an accomplished student of international law. He had already published an excellent book on that subject. While the duties of commanding general during an active conflict left him no time for research and codification himself, he knew what ought to be

done and how it ought to be done; and he called Francis Lieber, then a professor in Columbia College, and already a publicist distinguished upon both sides of the Atlantic, to the assistance of the government. The first service which Lieber rendered was the preparation in 1862 of a statement or essay upon *Guerilla Parties Considered With Reference to the Laws and Usages of War*. One cannot read this paper now, with its definite and lucid statements based upon grounds of reason and supported by historical reference, without feeling that it must have been a real satisfaction to the burdened and harassed Union authorities at Washington to have such a guide in dealing with the multitude of cases continually arising in that debatable land which intervenes between disciplined and responsible warfare on the one hand and simple robbery and murder on the other.

On the seventeenth of December, 1862, by order of Secretary Stanton, a board was created "to propose amendments or changes in the rules and articles of war and a code of regulations for the government of armies in the field as authorized by the laws and usages of war," and this board was made up of Francis Lieber, LL. D., and four volunteer officers, Generals Hitchcock, Cadwalader, Hartsuff and Martindale. That part of the board's work which consisted of preparing the code of regulations appears to have been committed to Doctor Lieber. The nature of the field upon which he entered and the spirit in which he did his work are indicated by Lieber's letter transmitting the result to General Halleck, on the 20th of February, 1863:

MY DEAR GENERAL:

Here is the project of the code I was charged with drawing up. I am going to send fifty copies to General Hitchcock for distribution, and I earnestly ask for suggestions and amendments. I am going to send for that purpose a copy to General Scott, and another to Hon. Horace Binney. \* \* \* I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well-read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no ground-work, no text-book. I can assure you, as a friend, that no counselor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization have been my guides; but of course the whole must be still very imperfect. \* \* \*

Lieber's estimate of the work and of the occasion for it is shown in a letter from him to General Halleck of the 20th of May, 1863:

My dear General,—I have the copy of General Orders 100 which you sent me. The generals of the board have added some valuable parts; but there have also been a few things omitted, which I regret. As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the United States to the stock of common civilization. I feel almost sad in closing this business. Let me hope it will not put a stop to our correspondence. I regret that your name is not visibly connected with this Code. *You* do not regret it, because you are void of ambition,—to a faulty degree, as it seems to me \* \* \* I believe it is now time for you to issue a *strong* order, directing attention to those paragraphs in the Code which prohibit devastation, demolition of private property, etc. I know by letters from the West and the South written by men on our side, that the wanton destruction of property by our men is alarming. It does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult. Your order, though impressive and even sharp, might be written with reference to the Code, and pointing out the disastrous consequences of reckless devastation, in such a manner as not to furnish our reckless enemy with new arguments for his savagery. \* \* \*

The instructions comprise one hundred and fifty-seven articles. The scope of the work can be indicated briefly by stating the titles of the ten sections in which the articles are grouped.

Martial Law; Military Jurisdiction; Military Necessity; Retaliation.

Public and Private Property of the Enemy; Protection of Prisoners, and especially Women; of Religion, the Arts, and Sciences—Punishment of Crimes Against the Inhabitants of Hostile Countries.

Deserters; Prisoners of War; Hostages; Booty on the Battlefield.

Partisans; Armed Enemies not Belonging to Hostile Armies; Scouts; Armed Prowlers; War Rebels.

Safe Conduct; Spies; War Traitors; Captured Messengers; Abuse of the Flag of Truce.

Exchange of Prisoners; Flags of Truce; Flags of Protection. The Parole.

Armistice—Capitulation.  
 Assassination.  
 Insurrection; Civil War; Rebellion.

The provisions on these subjects give evidence of great learning and careful consideration. They covered the entire historical field of questions which had arisen and the possibilities of questions likely to arise, calling for instruction and direction. The definitions are clear, the injunctions and prohibitions distinct and unambiguous, and, while the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied.

These instructions directed the action of the Union officers and controlled the conduct of the Union forces during that great war which ended in the triumph of the armies on which their limitations were imposed. No one can say how far it was due to the instructions, but in honoring the memory of Francis Lieber we should not forget that after the surrender and the triumph came reconciliation, friendship, the restoration of a united country, and, beyond all human experience, even within the lifetime of the generation which had waged the conflict, freedom from the bitterness of spirit that time cannot soften.

Although the instructions were prepared for use in a civil war, a great part of them were of general application, and they were adopted by the German Government for the conduct of its armies in the field in the war of 1870 with France. It is interesting that this work of a simple private citizen should become the law controlling the mightiest forces of both the country of his adoption and the country of his birth. The sanction of two powerful governments for these rules and their successful employment in two of the greatest wars of modern times gave to them an authority never before acquired by any codification or statement of any considerable number of rules intended for international application. The prediction of Lieber that General Orders No. 100 would do honor to our country, that it would be adopted as a basis for similar works by the English, French, and Germans, and that it would be a contribution by the United States to the stock of common civilization, was justified. In the Brussels Conference of 1874, convened at the instance of the Emperor of Russia for the

purpose of codifying the laws and customs of war, the Russian delegate, Baron Jomini, as President of the Conference, declared that the project of an international convention then presented had its origin in the rules of President Lincoln. The convention agreed upon at Brussels was not ratified, but in 1880 the Institute of International Law made the work of the Brussels Conference and the work of Lieber, which so far as it was of general application was incorporated in that convention, the basis of a manual of the laws of war upon land; and finally, in The Hague Conferences of 1899 and 1907, the conventions with respect to the laws and customs of war on land gave the adherence of the whole civilized world in substance and effect to those international rules which President Lincoln made binding upon the American armies fifty years ago. Writing of Lieber's work, Sheldon Amos says in his book on *Political and Legal Remedies for War*:

The instructions were, in fact, the first attempt to make a comprehensive survey of all the exigencies to which a war of invasion is likely to give rise; and it is said on good authority that, with one exception (that of concealing in an occupied district arms or provisions for the enemy), no case presented itself during the Franco-German War of 1870 which had not been provided for in the American instructions.

Frederic de Martens, after describing the way in which Lieber's work came to be done, says:

So it is to the United States of North America and to President Lincoln that belongs the honor of having taken the initiative in defining with precision the customs and laws of war. This first official attempt to codify the customs of war and to collect in a code the rules binding upon military forces has notably contributed to impress the character of humanity upon the conduct of the northern states in the course of that war.

Bluntschli says, in his article on *Lieber's Service to Political Science and International Law*:

The Instructions for the Government of Armies of the United States in the Field were drawn up by Lieber at the instance of President Lincoln, and formed the first codification of International Articles of War. This was a deed of great moment in

the history of international law and civilization. Throughout this work also we see the stamp of Lieber's peculiar genius. His legal injunctions rest upon the foundation of moral precepts. The former are not always sharply distinguished from moral injunctions, but nevertheless, through a union with the same, are ennobled and exalted. Everywhere reigns in this body of law the spirit of humanity, which spirit recognizes as fellow-beings, with lawful rights, our very enemies, and which forbids our visiting upon them unnecessary injury, cruelty, or destruction. But at the same time, our legislator remains fully aware that, in time of war, it is absolutely necessary to provide for the safety of armies and for the successful conduct of a campaign; that, to those engaged in it, the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored.

Then follows a very interesting statement by Bluntschli which points out a consequence of the instructions not the least in value to the student of international law and to the development of that science upon which the hoped-for peace of the world so largely depends. It appears that Bluntschli found in Lieber's work the inspiration of his celebrated codification of international law, for he says:

These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which should express the present state of the legal consciousness of civilized peoples.

Professor Ernest Nys sums up the far-reaching effect of Lieber's codification by the statement:

The ideas of the American publicist have penetrated not only the scientific world through the works of Bluntschli, but by the work of the Conferences of Brussels in 1874, and The Hague in 1899 and 1907, they have penetrated international politics.

Major General George B. Davis, who is specially qualified to treat of the subject from the different points of view of the Judge Advocate General of the Army and of the international lawyer, has kindly furnished me with a memorandum upon the relations in detail be-

tween General Orders 100 and the Hague conventions, and I will ask the Secretary to print the memorandum in the Proceedings with this paper.<sup>1</sup>

When we recall the frightful cruelties upon combatants, upon prisoners, upon citizens, the overturning of all human rights to life and liberty and property, the fiendish malignity of oppression by brutal force, which have characterized the history of war, we cannot fail to set a high estimate upon the service of the man who gave form and direction and effectiveness to the civilizing movement by which man at his best, through the concurrence of nations, imposes the restraint of rules of right conduct, upon man at his worst, in the extreme exercise of force.

Let me say something about the man himself. He was born in Berlin on the 18th of March, 1800. His childhood was passed in those distressful times when the declaration of the rights of man and the great upheaval of the French Revolution had inspired throughout the continent of Europe a conception of popular liberty and awakened a strong desire to attain it, while the people of Prussia were held in the strictest subjection to an autocratic government of inveterate and uncompromising traditions. In the meantime foreign conquest, with the object lessons of Jena and Friedland and the Confederation of the Rhine, threatened the destruction of national independence; and love of country urged Germans to the support of a government which the love of liberty urged them to condemn. It was one of the rare periods in which political ideas force themselves into the thought and feeling of every intelligent life, and, alongside with the struggle for subsistence, the average man finds himself driven by a sense of necessity into a struggle for liberty, opportunity, peace, order, security for life and property—things which in ordinary times he vaguely assumes to come by nature like the air he breathes. So the early ideas of the child were filled with deep impressions of the public life of the time. He remembered the entry of Napoleon into Berlin after Jena. He remembered the humiliation of the peace of Tilsit. He remembered Schill, the defender of Colberg, and Stein, and Scharnhorst. He was a disciple of Doctor Jahn, the manual trainer of German patriotism. At fifteen, after the escape from Elba, he enlisted in the Colberg regiment and fought

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<sup>1</sup>Printed herein, p. 22.



under Blücher at Waterloo. He was seriously wounded in the Battle of Namur and had the strange and vital discipline of lying long on the battlefield in expectation of death. He was a member of patriotic societies and was arrested in his nineteenth year, and imprisoned four months on suspicion of dangerous political designs. He was excluded from membership in the German universities, except Jena, where he received his degree of Doctor of Philosophy in 1820. At twenty-one he made his way to Greece with a company of other young Germans, inspired, by a generous enthusiasm for liberty, to an unavailing attempt to aid in the Greek War of Independence. Returning penniless from Greece he found his way to Rome, became a tutor in the family of Barthold George Niebuhr, then Prussian Ambassador, and there he won the confidence and life-long friendship of that great historian whose influence in familiar intercourse both increased the learning and calmed and sobered the judgment of the impetuous youth. Returning to Prussia, he was again arrested and imprisoned for nearly a year upon charges of disaffection to the government. Released through the intercession of Niebuhr, he went to England, and after a year's hard struggle there, he came, in 1827, to the United States and to Boston. Seeking employment he found it in taking charge of the Boston Gymnasium. Through Niebuhr's good offices he became the American correspondent of a group of German newspapers. He devised a plan for the publication of an encyclopedia, and for this he secured a distinguished list of contributors and associates. He became its editor, and in 1829 the publication of the *Encyclopedia Americana* was begun. It was a distinct success. Lieber's connection with it not only forced him to a broad and accurate knowledge of American life, but brought him in contact with a great range of leaders of American thought and opinion, and this association gave him an intimate knowledge of American social conditions and public affairs. Bancroft, and Hiliard, and Everett, and Story, and Nicholas Biddle, and Charles Sumner were among his friends. In June, 1835, he was made Professor of History and Political Economy in South Carolina College, and for twenty-two years he held that chair, until, in 1857, he was called to Columbia College to be Professor of Modern History, Political Science, International Law, Civil and Common Law. His connection with Columbia and his residence in New York continued until his death in October, 1872. In the meantime, to the service as

adviser to the government, which I have already described, he added the classification and arrangement of the Confederate archives in the office of the War Department, and long served as umpire under the Mexican Claims Commission of July 4, 1868.

Lieber himself has said that his life had been made up of many geological layers. The transition from his adventurous youth to the life of an American college professor did indeed carry him from igneous to sedimentary conditions. Under the new conditions, however, his surpassing energy and capacity for application found exercise in authorship. His work on *Political Ethics*, published in 1838, and that on *Civil Liberty and Self-Government*, published in 1853, gave him high rank among writers upon the philosophy of government. Judge Story said of the former:

It contains by far the fullest and most correct development of the true theory of what constitutes the state that I have ever seen. It abounds with profound views of government which are illustrated with various learning. To me many of the thoughts are new, and striking as they are new. I do not hesitate to say that it constitutes one of the best theoretical treatises on the true nature and objects of government which has been produced in modern times, containing much for instruction, much for admonition, and much for deep meditation, addressing itself to the wise and virtuous of all countries.

And in an introduction to the latter work, Theodore Dwight Woolsey said:

It would be a grateful task to speak at length here of the service Doctor Lieber rendered to political science in this country. \* \* \* He was indeed the founder of this science in this country in so far as by his method, his fulness of historical illustration, his noble, ethical feeling, his sound practical judgment, which was of the English rather than of the German type, he secured readers among the first men of the land, influenced political thought more than any one of his contemporaries in the United States, and made, I think, a lasting impression on many students who were forming themselves for the work of life.

By a great variety of miscellaneous essays, addresses, and magazine articles on subjects of education, penology, history, biography, consti-

tutional and international law, he exercised a powerful influence upon the development of American thought. By voluminous correspondence with many foremost Americans who were engaged in public affairs he made his influence felt upon the solution of specific questions in the conduct of government. A correspondence of many years with Charles Sumner is especially rich in matter of this description.

The philosophical habit of the German, the practical habit of the Englishman, the freedom from traditional limitations upon thought of the American, the breadth of view of his cosmopolitan experience, the intensity of his enthusiasm at once for liberty and for order, and the strength of his genuine sympathy for all mankind combined to set him in advance of his time in his views upon international law and his proposals for its development. We find him writing to Sumner on the 27th of December, 1861, after the Trent Affair—more than fifty years ago:

This would be a fair occasion to propose a congress of all maritime nations, European and American, to settle some more canons of the law of nations than were settled at the Peace of Paris,—canons chiefly or exclusively relating to the rights and duties of belligerents and neutrals on the sea; for there lies the chief difficulty. The sea belongs to all; hence the difficulty of the sea police, because there all are equals. I mean no codification of international law; I mean that such a congress, avowedly convened for such a purpose, should take some more canons out of the cloudy realm of precedents than the Peace of Paris did almost incidentally. Suppose Russia, Austria, and other nations (naming them) could be induced to send, each power, two jurists (with naval advisers if they chose), does any one, who knows how swelling civilization courses in our history, doubt that their debates and resolutions would remain useless,—even though the whole should lead, this time, to no more than an experiment? All those ideas that are now great and large blessings of our race, having wrought themselves into constitutions or law systems, belonged once to Utopia.

On the 16th of April, 1866, he writes to Bluntschli in Heidelberg:

Your intention to write a brief code on the Rights of Nations, in the middle of the nineteenth century, is a noble and daring one. For a long time it was a favorite project of mine that four or five of the most distinguished jurists should hold a congress in order to decide on several important but still unsettled

questions of national equity, and perhaps draw up a code. First I proposed that it should be an official congress under the government, and corresponded with Senator Sumner on the subject. But after awhile it became clear to me that it would be much better if a private congress were established, whose work would stand as an authority by its excellence, truthfulness, justice, and superiority in every respect.

June 18, 1866, to his wife:

Have you read the noble declaration of Prussia, that she will not capture enemies' property at sea during war? Such things warm one like a glass of burgundy. \* \* \*

December 15, 1866, to Andrew D. White:

I fancy sometimes—but only fancy—how fine a thing it would be for one of the Peabodies, or some such gold vessel, to give, say twenty-five thousand dollars gold, for the holding of a private—i. e., not diplomatic, although international—congress of some eight or ten jurists, to concentrate international authority and combined weight on certain great points, on which we have now only individual authorities. I have spoken about this years ago to Mr. Field.

On the 11th of June, 1868, to Sumner:

What an advance it would be—though requiring nearly twenty-two centuries—from the time when Thucydides said that private property was not acknowledged at sea as on land, to the middle of the nineteenth century, when private property—even of the enemy—should be declared to be protected, even floating without defense, on the wide sea. \* \* \* I say that civilization would hardly have made or be able to make a greater stride in our century, than by the United States and North Germany agreeing on the great principle and thus inducing others to follow.

On May 7, 1869, to Judge Thayer:

The strength, authority, and grandeur of the law of nations rests on, and consists in, the very fact that reason, justice, equity, speak through men "greater than he who takes a city"—single men, plain Grotius; and that nations, and even Congresses of

Vienna, cannot avoid hearing, acknowledging, and quoting them. But it has ever been, and is still, a favorite idea of mine that there should be a congress of from five to ten acknowledged jurists to settle a dozen or two of important yet unsettled points—a private and boldly self-appointed congress, whose whole authority should rest on the inherent truth and energy of their own *proclama*.

On the 10th of April, 1872, to General Dufour, Honorary President of the International Committee of Geneva:

One of far the most effectual and beneficent things that, at this very juncture, could be done for the promotion of the intercourse of nations in peace or war (and there is *intercourse* in war, since man cannot meet man without intercourse)—one of the most promising things in matters of internationalism, would be the meeting of the most prominent jurists of the law of nations, of our Cis-Caucasian race—one from each country in their individual and not in any public capacity—to settle among themselves certain great questions of the law of nations as yet unsettled, such as neutrality, or the aid of barbarians, or the duration of the claims of obligations, of citizenship. I mean *settle* as Grotius *settled*,—by the strength of the great argument of justice. A code of proclamation, as it were, of such a body, would soon acquire far greater authority than the book of the greatest single jurist. I hope such a meeting may be brought about in 1874.

On the 26th of May, 1872, to Von Holtzendorff:

In 1846, in one of my writings, I recalled the fact that under Adrian, professors were appointed to lecture in different places, and Polemon of Laodicea instructed in oratory at Rome, Laodicea, Smyrna and Alexandria. The traveling professor had a free passage on the emperor's ships, or on the vessels laden with grain. In our days of steamboats and railroads the traveling professor should be reinstated. Why could not the same person teach in New York and in Strasburg?

You will perceive that here was a proposal of the exchange professorship, which we are putting in practice forty years after. Here was another proposal which was realized by the formation of the Institute of International Law. Of this Professor Bluntschli says:

Lieber had great influence, I may add, in founding the *Institut de Droit International*, which was started in Ghent, in 1873, and

forms a permanent alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world. Lieber was the first to propose and to encourage the idea of professional jurists of all nations thus coming together for consultation, and seeking to establish a common understanding. From this impulse proceeded Rolin-Jaequemyn's circular letter, drawn up in Ghent, calling together a number of men eminent for their learning. This latter proposal to found a *permanent academy for International Law* met with general acceptance, but this was merely a further development of the original idea of Lieber, which was at the bottom of the whole scheme.

Here also was the proposal for a meeting of official representatives which was the precursor of the conferences at The Hague. It is interesting to observe that while Lieber considered the unofficial meeting to be an alternative for the official one, both have been realized, and in practice the work of the unofficial members of the Institute of International Law has made possible the success of the official conferences at The Hague, by preparing their work beforehand and agreeing upon conclusions which the official conferences could accept.

The important characteristic which marshaled all Lieber's forces for leadership of opinion and gave his work its chief and permanent value was an elevation of spirit, a pervading moral quality which was refined by adversity and trial throughout the formative period of his life; and this quality was well expressed by two maxims which he made his guides. He says, in writing to Judge Thayer:

From early times I observed that in the French Revolution people had always clamored for rights and never thought of duty; that more or less this is the case in all periods of agitation, and almost universally so in our own times and in our country  
\* \* \* *right* and *duty*: both together, and all is well; right alone, despotism,—duty alone, slavery.

And, writing to Sumner, he says:

Let me now give you what I consider my chief law maxim: *Nullum jus sine officio, nullum officium sine jure*,—forgotten by despot and *Rouge* (they want nothing but rights), forgotten by the slave who thinks he has nothing but duty or obligation.

And this he condensed into the maxim: "*Droit oblige.*"

The other maxim he kept displayed on the walls of his lecture room: "*Patria Cara: Carior Libertas: Veritas Carissima.*" And these maxims he exemplified in his life and in his service to mankind.

He was no dry student delving for knowledge he could not use; but a living soul instinct with human sympathy and love of liberty and justice seizing eagerly the weapons of learning to strike blows in the struggle for nobler and happier life among men. He was no vapid theorist who "argued about it and about, and evermore came out the same door wherein he went," but a sagacious, practical man among men, dealing with human nature as it was, with all its weakness and folly and error, all its nobility and power; and seeking to shape the human material upon which he wrought to its best uses according to its real capacity and strength.

It was a wonderful career. It was a great thing to be the author of the Instructions. It was a great thing to give the impetus which produced the *Institut de Droit International* and made possible the success of the Hague Conferences. It was a great thing to be the man he was and to live a long life, loving learning and law and liberty and country, and kind, and blessed by consciousness of distinguished service to them all. It stirs the imagination that the boy who lay wounded on the battlefield of Namur for his country's sake and who languished in prison for liberty's sake and who left his native land that he might be free, should build his life into the structure of American self-government and leave a name honored by scholars and patriots the world over.

If our Society, at once national and international, were about to choose a patron saint, and the roll were to be called, my voice for one would answer "Francis Lieber."

MEMORANDUM SHOWING THE RELATION BETWEEN GENERAL ORDERS  
NO. 100 AND THE HAGUE CONVENTION WITH RESPECT TO THE LAWS  
AND CUSTOMS OF WAR ON LAND.

Prepared by Major General George B. Davis, U .S. Army.

<i>Lieber's Instructions.</i>	<i>Hague Convention of 1899.</i>
1-13 Martial Law.	Not mentioned, but cf. Arts. 42-56 on military occupation.
14-16 Military necessity.	In several articles. Arts. 23 and 40.
17, 18 Resort to starvation.	Not mentioned.
19 Notice of bombardment.	Art. 26.
20 Definition of war.	Not mentioned.
21 Status of enemy subjects.	Not mentioned.
22-25 Same subject.	Arts. 46-52.
26 Oath of temporary allegiance.	In Art. 45 a contrary view is expressed.
27-28 Retaliation.	Not mentioned.
29-30 Character of wars.	Not mentioned.
31 Appropriation of public money and property by belligerent.	Arts. 48-53.
32 Abolition of slavery.	Not mentioned.
33 Citizens of occupied territory not to be compelled to serve belligerent.	Art. 44.
34-37 Property belonging to religious or charitable foundations, or used for such purposes.	Art. 56.
38 Treatment of private property.	Art. 52.
39-41 Administration of occupied territory.	Arts. 53-49.
42-43 Slavery.	Not mentioned.
44 Protection of non-combatants.	Arts. 42-47.
46 Booty, prize.	Art. 45.
47 Crime in occupied territory.	Art. 43.



48	Deserters, recapture of, in service of the enemy.	Not mentioned. Offense punished by local law in Europe.
49-53	Prisoners of war. 56-67 have same subject.	Arts. 4-20.
49	Definition of "prisoner of war."	Not defined.
50	Same subject.	Art. 13.
51-52	Levies en masse are treated as prisoners of war.	Art. 2.
53	Surgeons, chaplains, etc.	Not mentioned; covered by Geneva Convention of Aug. 22, 1864.
54-55	Hostages.	Not mentioned, practice of giving them being obsolete in European war.
56-67	Treatment of prisoners of war.	Art. 4.
57-58	Colored troops.	Unknown in European war.
59	Crimes committed by prisoners of war.	Art. 8.
60-63, 66	Quarter.	Art. 23 (d).
64	Captured uniforms may be used with a distinctive badge.	Not mentioned.
66	Prohibited acts.	Art. 22.
68	Firing on outposts.	Not mentioned.
70	Poisoned weapons.	Art. 23 (a).
71	Additional wounding of prisoners.	Art. 23 (c).
72	Property of prisoners of war.	Art. 4.
73	Arms of prisoners of war.	Art. 4.
74	Ransom.	Not mentioned. Obsolete in European war.
75	Character of confinement.	Art. 5.
76	Subsistence of prisoners.	Art. 7.
76	Labor of prisoners.	Art. 6.
77	Escape of prisoners of war.	Art. 8.
78	Same subject. Penalty.	Art. 8.
79	Medical attendance of prisoners.	Art. 7.

80	Extortion of information from prisoners of war.	Art. 9, in part.
81	Definition of term "partisan."	Not mentioned.
82-84	Guerillas and	Not mentioned.
85, 102, 103	War rebels.	Not mentioned.
86-87	Safe conducts.	Not mentioned.
83, 88, 104	Spies.	Arts. 29-31.
89, 98	Giving information to enemy.	Not mentioned.
90-92, 102, 103	War traitors.	Not mentioned.
93-97	Guides.	Art. 24, in part.
99, 100	Messengers. Carriers of despatches.	Not mentioned.
105-110	Exchange of prisoners.	Not mentioned.
107	True name of prisoners.	Art. 9.
111-114	Flags of truce.	Arts. 32-34.
115-118	Designating flags for hospitals and protected buildings.	Art. 27.
119-134	Paroles.	Arts. 10-12.
135-147	Truces and armistices.	Arts. 36-41.
144	Capitulations.	Art. 35.
148	Assassination.	Art. 23 (b).
149-157	Insurrection, Civil War, Rebellion.	Not mentioned, as The Hague rules of 1899 were primarily intended to regulate operations of war between sovereign states. No European state would bind itself, save in the most general way, in carrying on operations incident to the suppression of rebellion.

THE CHAIRMAN. It gives me pleasure to recognize Major General George B. Davis, who will make a few remarks upon the subject of Mr. Root's paper.

General DAVIS. Mr. Chairman, after the very just and lucid presentation of the life and services of Dr. Lieber, to which we have just listened, it seems to me that there is little room left for anything further in the way of speech, especially upon such a warm evening. But there are some little side lights that I can throw upon Dr. Lieber's career, which may prove of interest to some of you.

It is interesting to know that his first service and his last were essentially military in character. As a boy, brimming over with patriotic enthusiasm, he was struck down by a French bullet on the battlefield of Namur. In these days of merciful projectiles we find little to remind us of the woes and projectiles of the Napoleonic era. An ounce bullet was in use then, something like three-quarters of an inch in diameter, and anybody that was hit with such a projectile knew it. It was not a case of the bullet going clean through the body of the sufferer and of his making the discovery, somewhat later, that he had been pierced with a ball. In the Waterloo campaign the wounded man knew it at the very instant when he came in contact with an ounce of lead.

Dr. Lieber was twice wounded, once in the head and a second time in the body—he thought at the moment he had been shot through the lung, but, fortunately, that was not the case. Due to his youth and constitution, he recovered from these wounds very quickly after the surgeons were able to get at him, which was a very long time, indeed, as was usual in those days. A few weeks after his recovery, he was attacked by typhus fever—not typhoid, but typhus; and he survived that.

The abounding patriotism that led him to defend his country was, somewhat later, to be his undoing. The sentiments that were so applauded by the members of the ministry in arousing a spirit of resistance to the operations of the Emperor Napoleon, were not forgotten at Waterloo but continued with him to the end. He did not forget them when Napoleon had been eliminated as a factor in European politics, but he continued to cherish them as he had done before 1815 and, as a result got himself into trouble with the authorities and was obliged to migrate, first to England, and a little later, to the United States.

His career for something more than thirty years in the country of his adoption was that of a thinker and educator, and I feel that I am

correct in saying he was one of the ablest and most respected educators that worked and taught during that period.

I have often wondered why it was that this adopted citizen, conceding all his engaging qualities, and they were many, his manner of inspiring enthusiasm among his students, attaching them to him with hoops of steel—why it was that this German scholar became such an influential figure in the world of education. I cannot but believe that, at the time he came, education was at rather a low ebb; in other words, I should put it a little better, perhaps, if I were to say that the higher education had not sufficiently developed to be the force that it ought to have been in the United States at the time when Dr. Lieber's great work as a teacher began.

Dr. Lieber and another very eminent German, Dr. Karl Follen, who settled in Boston in the early part of the last century, were trained university men, trained teachers, men of broad educational views; and that was the very thing the need of which was so generally and clearly recognized in the United States.

An anecdote or two I think will put the situation before you and enable you to reach a conclusion—not that which I have reached, but something possibly in that direction.

General Leavenworth, of the army, was born about 1790, in a little town in northwestern Connecticut, and as he grew toward majority, he had a most earnest desire for some kind of accurate scholarship, for something exact in the way of knowledge. He did not know quite what it was that he needed, but he had the yearning. He found that the only thing that gave him the mental training that he needed in the way of exact study was Blackstone's *Commentaries*, then as now a most useful and learned work, admirable above all things in the logical way in which principles of the common law are presented. A little later George Ticknor, of Boston, one of our greatest American scholars, who had been taught Latin and Greek by a tutor from Trinity College, Dublin, an expert in the teaching of those languages, was sent by his father, for some strange reason, to one of the smaller New England colleges. Young Ticknor wrote to his father and said, "Why did you send me here, I would really like to know? I know more Latin than the professor of Latin, and I know more Greek than the professor of Greek." His father saw that he had made a mistake and sent young Ticknor to Germany, and he was the first American student to enter a German University and take the

regular courses of lectures with a view to a degree. In his autobiography he says that the university people did not quite know whether an American was red or white. He was not only the first or one of the first, but he was one of the best of our university trained students, as was shown by his later critical work, especially his *History of Spanish Literature*, a work of standard and permanent value.

I think the reason why Lieber, to a very great degree, and Dr. Karl Follen of Boston, to a less degree, perhaps, were so popular and so admired and loved and respected as teachers and professors was that they were men of broad, liberal views; they were men of thorough scholarship, of thorough training, and both of them had the genius for educational work.

In closing, I will say a word or two about General Orders No. 100, of 1863. After the second campaign of Bull Run in 1862, General McDowell, a very able soldier and a very patriotic citizen, who had commanded an army corps in that campaign, wrote to Mr. Lincoln that a colonel of a New York regiment in one of the recent battles in the vicinity of Bull Run was mortally wounded. There was no possible hope of his recovery. He had but a few minutes to live, and a friend, an officer of his regiment, came to take his last wishes and messages. The wounded colonel said: "I die a victim to Pope's incapacity and McDowell's treason." What had General McDowell been doing that was treasonable—because there was never a soldier more thoroughly loyal to his country than General McDowell.

One of the commonest rules of war requires a commanding general in occupied territory to protect the inhabitants and their property. Such protection is required of every government in time of peace; it is a thousand times more necessary in time of war. The particular offense that he was trying to uproot and put out of existence was that of plunder. Soldiers would go to houses that were occupied more frequently than not by women, and take away the little food that was left for their use. That was one of the offenses against the laws of war the General strove to prevent. Another was this: The laws of war forbid outposts to be fired upon. The practice has somewhat changed, but, as it was then, an outpost was one whose duty it was to observe, he could do nothing against the enemy. He was stationed in some commanding place where he could overlook the ground in front of him, and it was his duty to give notice of the approach of the

enemy. He was perfectly helpless. He could not fire upon the enemy if he saw him, and could only give warning of his approach; and so, as he was doing nobody any harm, it was a well-established principle that an outpost should not be assassinated, should not be fired upon; that pot-shots should not be taken at him.

These two practices, the most fundamental perhaps in the rules of war, General McDowell had been trying to enforce in his command; but here a man *in articulo mortis*, a man of the highest character, knowing that he had but a few moments to live, had said: "I die a victim to Pope's incapacity and McDowell's treason." A court of inquiry was called and General McDowell's military reputation was vindicated.

The incident which I have related showed what a field there was for cultivation, by somebody who was competent to make a clear and lucid presentation of the ordinary rules of war.

There is nothing in Dr. Lieber's General Orders No. 100 that is new, or abstruse; nothing which it is difficult to understand. In the practice of modern war it bears a resemblance to the Ten Commandments. Women and children shall not be interfered with; they are to be protected at all costs. Non-combatants are equally to be protected if they take no part in the war. Churches are not to be interfered with and shall not be used for any except their proper purposes. These are very simple statements. But the incident I have related shows how great a necessity there was that the officers and men in the armies of the United States should understand and practice the laws of war. That training they gained in full measure in General Orders No. 100.

Several officers were associated with Dr. Lieber on the board. The one who, I think, rendered him the greatest assistance was General Ethan Allen Hitchcock, of St. Louis, an old officer of the army, a man of great ability and power and of very wide observation, who had an experience of over forty years in the military service; and had what probably Dr. Lieber did not have—the terminology of military operations at his fingers' ends. Dr. Lieber could state the principle of international law, and General Hitchcock was able to give its proper application to the military service in technical terms that officers and men could understand. No one more deeply and profoundly admired Dr. Lieber than did General Hitchcock, who was his principal collaborator in this work.

At one time I was very curious to know what General Halleck's action was when the report containing the matter for the proposed General Order was submitted to him. He was himself an international law writer of very great authority. For a number of years no British vessel of war went to sea without a copy of Sir Sherstone Baker's English edition of Halleck's *International Law*, an excellent book which is still fairly up to date. I wondered what one of General Halleck's standing and experience would have to say about the code of rules that were submitted with a view to its introduction into a General Order. It is gratifying to know that it was most cordially received and approved by General Halleck. Not an "i" was dotted, not a "t" was crossed. There was a simple approval of it by the commanding general, who had watched its progress hopefully from day to day as the work moved on toward completion. There was cordial approval of the entire project, which matter was submitted to the Secretary of War and the President with a view to its adoption in the military service.

Dr. Lieber has a unique distinction. Sometime ago I read a very excellent French book on *Prisoners of War*. I was very much surprised to find that the first serious attention that was ever given to the treatment of prisoners of war was by Benjamin Franklin and John Adams in our treaty with Prussia of 1785. Going over the various requirements of the two Hague conventions as to the treatment of prisoners, it will be found that in many important matters they are not yet abreast the great clauses which Franklin caused to be inserted in the treaty with Prussia of 1785.

The French author of the work on *Prisoners of War*, a writer of great ability, pays a high tribute to the American negotiators of that treaty; he pays an equally high tribute to Dr. Lieber for his work in the preparation of General Orders No. 100, a considerable portion of which is devoted to the care and treatment of prisoners of war, an executive instruction which had been in force in the United States for nearly thirty years before the subject received any general or serious attention in Europe, and nearly forty years were to pass before the matter was to receive consideration at the hands of an international conference. Dr. Lieber's contribution to the laws of war was a memorable one; his contribution to the cause of humanity was infinitely greater, and his memory will be tenderly cherished by those whose efforts to mitigate the severity of the rules

of war and to reduce its inevitable hardships have been constant and untiring.

I thank you for your attention.

The CHAIRMAN. I have very great pleasure in introducing Mr. Talcott Williams, Director of the Columbia School of Journalism, in the City of New York, who will speak to us upon the question entitled, "The share of the United States in opening the world's seas and waterways."

### THE PEACE OF THE WATERWAYS.

#### THE SHARE OF THE UNITED STATES IN OPENING THE WORLD'S SEAS AND WATERWAYS.

ADDRESS OF DR. TALCOTT WILLIAMS, *Director of the Columbia School of Journalism*, New York City.

The United States was the first of the Powers, great or small, which rested its diplomatic policy in despatches, and its action by arms, upon the broad principle that the justice of humanity required that all the common utilities of the earth should be open to all men and all flags on terms of even-handed equality. In Jefferson's sonorous phrase in 1792, "The ocean is free to all men and the rivers to all their inhabitants."

The first of these is now so universally true and the second so generally practised, that none now realize in how different a world the Republic first stood forth to challenge immemorial 140 years ago. Neither ocean nor rivers were free in 1783 when the United States began its consistent and unvarying determination to free both from their various servitudes. Broad stretches of the ocean and numerous seas were restricted. The three-mile limit was far from universally accepted. Jurisdiction was claimed at distances of twelve, fifteen, eighteen and twenty miles. Revenue cutters made seizures at longer distances and still are empowered to do so by the municipal law of more than one land. The rights of capture after a blockade had been declared were carried to an inordinate distance. Contraband of war was an indefinite term capable of almost any application. Search and seizure were powers claimed by all navies and ruthlessly exercised by British vessels. In 1736 (9 Geo. II, c. 35), English law extended



search and seizure for offenses against the revenue law and a possible hostile intent to four leagues from shore. Our own statute wisely permitted confiscation when a vessel that had unloaded four leagues from shore (Act March 2, 1797), and came later within the national jurisdiction. In order the better to guard Napoleon Bonaparte at St. Helena, an English hovering act claimed the right of seizure over a wider area and a longer distance, a statute quoted by Secretary Blaine in regard to the attempt of the United States—one of the few aberrations of our policy in nearly a century and a half—to turn into a “closed sea” a sheet of water with a gate 1800 miles wide.

Against all these attempts to curtail marine jurisdiction the United States rigorously protested. Jefferson refused to recognize the claims of Spain six miles from the Cuban coast.<sup>1</sup> Nowhere was the United States willing to accept any compromise. Seward and Fish followed the example of Jefferson in dealing with Spain, and when in 1878 the English Territorial Jurisdiction Act was passed abandoning the nebulous claims of the past, which Sir William Scott (Lord Stowell) swept aside with the pitiless logic of his high juridical sense, the early contention of the United States was fully established. Remembering perhaps our repeated claims, enunciated in one leading instance when M. Drouyn de l’Huys protested against the action of the *Kearsarge* and *Alabama* out of the three-mile limit but with the French coast within the range of modern projectiles, and Minister Dayton maintained that the increased power of ordnance had not altered an ancient ordinance, the United States has in the last two years, with, perhaps, undue patience, endured stray Mexican shots across our frontier.

The maintenance to its conventional range set by Grotius of this three-mile limit to any exercise of jurisdiction by any individual sovereignty trenching upon the broad right of humanity to the free navigation of the open sea, only began the efforts and the influence of the United States towards freeing the ocean from the encroaching claims of Powers, either civilized or savage, commercial or piratical, prescriptive or predatory. The end of the eighteenth century found whole seas parcelled, with great stretches of ocean over which a juris-

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<sup>1</sup>For citation on this and other points, I frankly refer the reader to the *International Law Digest* of Professor John Bassett Moore, a mine in which all will dig for years and years to come. I have, however, with a desire every student will understand, not to plough wholly with another man’s heifer, scrupulously verified all his references on the issues cited, with renewed admiration and homage for his accuracy, his method, his grasp of principle and his command of detail.

diction as peremptory was established as that which was laid down by the Peace of Antalcidas keeping the Phœnician galleys on one side of a promontory and the Hellenic on the other. Through all ancient diplomacy, first between the Egyptian monarchy and the stray Greek galley, then between the Persian empire and the Greek triremes, half mercantile, half military, and later between the Carthaginian ship with its lateen sails and the Roman with its oars, there was perpetual irritation and perpetual struggle for the possession not merely of the land, but of the seas, which was divided between the nations and its jurisdiction settled by treaty in a fashion unknown to modern diplomacy. The first establishment of the peace of any sheet of waters in ancient times came when Pompey swept the pirates from the Mediterranean, and Roman law, dealing first with the rivers of Gaul and later with the Rhine and Danube, the upper waters of the Nile and the safety of Spanish streams, threatened the corsairs, as mural inscriptions show even in the time of the Antonines, ended in the dictum of the Institute, still sound law and sound history: "*Flumina publica sunt, hoc est populi Romani.*"

Here, as at so many other points in the "conflict of laws" in the law of the *prætor*, in the recognition of aliens, of a universal citizenship, in the protection of travel, transit, and in the enumeration of the rights and responsibilities of the common carrier by land and by sea, Rome in all regions laid the foundation of that general sanction of the common right of humanity to the common heritage of man, which is, as I have already said, the fundamental basis of civilization. In very truth, "*hoc omne est populi Romani.*"

When the next great republic appeared, whose far flung shield over five and one-half million square miles makes the *salus populi Romani* but a little thing, this ancient heritage had through dark centuries been wasted and trodden under foot. The Barbary pirates held the gate of the Mediterranean at the Straits of Gibraltar, and levied toll upon all comers. They were supported by annual tributes from many lands reaching nearly \$200,000 a year from England alone, paid in order to exclude from the Mediterranean trade the flags of lands and peoples too weak to defend themselves and too poor to equal this ransom, large under the standards of the eighteenth century. The Turkish Empire claimed at various periods similar rights in the East Mediterranean, and at will closed the Dardanelles and the Bosphorus to all comers. England itself, within the memory of men still living, demanded and enforced homage to its flag in the open and storm-swept waters of the

four seas about the British Isles. Denmark under treaties and claims as old as the Hanseatic League levied "sound dues" at the entrance of the Baltic, and it was part of the Continental policy of the French under Napoleon to use these ancient rights to turn the Baltic into a closed sea. The Red Sea was another closed tract. The Persian Gulf was held by a piratical Arab confederation. A power still stronger, if more loosely organized, centered in the pirate bays of Madagascar and made the Indian Ocean perilous. Portugal for centuries claimed the right to all navigation beyond the Cape of Good Hope, and Spain still exercised the same challenge when the American flag first appeared upon the Pacific, as to navigation west of Cape Horn. Russia made the same egregious demand as to the northern part of the ocean and harried any vessels found in nearly a fifth of its vast area which lay between its Siberian and Alaskan coast lines. Burdensome colonial laws drew arbitrary lines over the seas off Brazil which even Chief Justice Marshall, under the spell of the legalism of an earlier age, recognized in a decision, later reversed. Spain practiced the same policy on the Spanish main. The reports of our early courts are full of insurance cases turning upon the rights of the mariner whose vessel had been seized or wrecked but who was protected by marine policies which expressly excluded him from the ocean-like stretch of open seas, over which brooded the oppressive colonial policy of Spain. Even when the negotiations were in progress for the purchase of Louisiana, Spain proposed to make a closed sea of all that particular part of the Gulf of Mexico which lay above a line drawn from Key West to the outermost point of Yucatan.

Against these manifold restrictions and these various efforts to make national privilege of the opportunity of humanity, the United States instantly threw all the weight of its national influence and its military force, small and as yet unknown, in its defense of the loftiest ideals of the race. While every other weak country and the great Powers had yielded to the Barbary corsairs, the American Republic, after refusing to negotiate treaties which admitted the payment of tribute, sent its fleet into the Mediterranean, bombarded Tripoli, brought Algiers to terms, forced the Sultan of Morocco to negotiate on even ground, and within two years after the first gun was fired had swept away the whole fabric of hereditary spoliation which other nations had endured so long. Where the flag flew, there, the world began to know, the freedom of the seas was asserted and no land could claim more than another in the equal rights of all men to the world's waters. The risk

and danger of Moorish piracy, which in 1818 finally yielded to the guns of Lord Exmouth, long continued. Half a century ago, there were still men in New England seaports who could remember the collections taken up in their boyhood to ransom slaves in the Barbary States, and even I can recollect seeing on an American clipper vessel bound from Boston to Smyrna, the men told off to gun crews and called to quarters for drill in working the two small guns which were intended to protect the vessel during a calm and in case of wreck from Riff Feluccas, craft which in our own day have piratically plundered vessels in the shadow of the mountain range, across from Gibraltar, mountains in sight of Europe whose hinterland is still untrod by Europeans.

The sound dues were levied upon the shipping of the world by the Kings of Denmark from early mediæval days. They had been accepted as early as 1368 by the Hanseatic Republics. Two centuries later, Charles V in 1554, and in 1490, Henry VII of England, had laid this burden on the trade of the Netherlands and of England. Down to 1841, England was still accepting their toll on a strait between two open seas in a convention between the two Powers. The United States refused to continue a practice which was five centuries old. The lucid mind of John C. Calhoun in 1844 asserted in a despatch to our minister at Copenhagen "Under the public law of nations it cannot be pretended that Denmark has any right to levy duties on vessels passing through the sound from the North Sea to the Baltic. Under that law, the navigation of the two seas connected by this strait is free to all nations; and therefore the navigation of the channel by which they are connected ought also to be free." The claims of Denmark, Secretary Calhoun pointed out, "were laid in a remote and barbarous age." The United States refused to submit to this practice longer. It was willing to pay a fair sum for the period in which the existing treaty must remain in force, two years or so, but at the end of that time it was clear that the American Government would act. In 1853, after nearly a decade of negotiation, Secretary Marcy warned Denmark "nothing has been more remote from the purpose of our Government from the day in which it was ushered into existence than that of surrendering to any Power its right of using the ocean as the high sea of commerce. This right it claims and will use all proper means to secure to itself the full enjoyment of, in every quarter of the globe." The United States then took steps to abrogate the treaty. In

1857, Denmark yielded and the dues were abolished, after a little less than five centuries of accepted but unjustifiable exaction.

It was the one praiseworthy incident of the unfortunate period of negotiation with the North African Powers before the American guns were heard that spoke peace and ended on the Mediterranean a piracy, continuous since the breaking up of the guardian galleys of Rome at the end of the fifth century, that Commodore Bainbridge, in command of the United States frigate *George Washington*, had sailed through the Dardanelles in spite of a challenge to anchor and under fire of the forts. To the early claims of Turkey, who controlled entrance and egress from the Black Sea, through either the Bosphorus or the Hellespont, under the successive treaties from 1774 to 1856 in which the European Powers accepted and applied this restriction to two open waterways, the United States since Bainbridge's daring act, has offered a resolute refusal. Its war vessels repeatedly entered the Sea of Marmora, its minister was corrected for having sought permission for the *Congress* to pass the Dardanelles, and protests against this policy of Turkey have continued down to within the last twenty years. In pursuance of this policy the United States refused to permit the Straits of Magellan to be closed either by Spain or by Chile. It asserted and protected the same freedom as to the Red Sea and the various straits in the Malaysian archipelago over which one local Power and another claimed authority. It asserted the right to free navigation of the inner Sea of Japan, to the Persian Gulf, and the final removal of these last limitations did not take place until 1854, when the English treaty with the Trucial Arabs finally gave security to the pearl fisheries of Bahrein and freedom to the navigation of the gulf itself.

This resolute assertion of the freedom of the seas was accompanied by very nearly the first consistent suppression of piracy which the world had seen. England in the Mediterranean had established easy relations such as Penn charged of the Philadelphia Common Council when he asserted that they were partners with piracy and allies with pirates, by permitting piracy in one sea and another as long as the British flag was respected. It was under the encouragement of this policy of limited piracy, that pirate haunts and ships long remained in the Gulf of Mexico and were still rife when the American flag first appeared there. Our vessels were actively employed in clearing away pirates wherever they appeared, even at the risk, which was not inconsiderable, of collision with the flags of England, France, and Spain,

in whose territories these vessels found harbor. Even as late as a century ago, Florida was a nest of pirates and, in the case of Amelia Island, the United States did not hesitate to land in Spanish territory in order to end this brigandage of the seas. The attack on the corsairs of the Mediterranean was only a part of the warfare which the United States waged through all the five centuries of our existence in destroying piracy. Our vessels sought pirates and attacked their haunts on the neutral coasts of Spain and Mexico as well as on the Spanish main. Our flag has been in action off Mozambique and on the pirate-infested shores of Madagascar. Desperate actions were fought in out-of-the-way straits and Dyak harbors of the great archipelago which once made the voyage to China a constant peril, and the coasts and rivers of that empire were cleared in no small measure by American vessels when other nations were accepting piracy as a necessary evil. It was the United States which first put a date for the end of the slave trade, first prohibited this traffic to its citizens and first declared it a piracy, all these steps being taken while other Powers lagged more or less behind, in this determination that the free seas should carry none but free human beings. By the middle of the nineteenth century the slave power in the United States had, while the earlier policy was still maintained, led in our diplomacy to objections against search which aided this traffic. Even these objections were based on the broad principle of protecting our vessels and all vessels from search by any Power on the high seas. For this principle the War of 1812 was fought. Its result ended the practice for all flags and by all fleets and added to accepted international law the far-reaching and just principle laid down by the greatest jurist who has dealt with the peace of the waters since the Rhodians first defined its practice, Lord Stowell,

So completely had the Roman principle that rivers belong to all the inhabitants on their banks for their free use in transportation, or as the common law phrases it "the ownership of those upon the banks of the stream extends only to its low-water mark and does not pass beneath its surface," disappeared from the practice of civilized man, while still remaining a principle of the jural code accepted by civilization, that every great stream was held by tolls at every stage of its navigation. The Treaty of Münster in 1648 had closed the Scheldt to those who lived upon the Rhine and the Meuse, and in spite of many protests its restriction, stifling the trade of two streams, remained unchanged. The Rhine had its tolls at every vantage, almost as numerous as the castles on its banks. Hamburg had repeatedly protested against

tolls on the Elbe, and Bremen to tolls on the Weser. The Po, short stream as it is, was under toll of each city strong enough to make these exactions. Austrian vessels were not seen in the portion of the Danube which lay outside of the jurisdiction of the German Empire. In the Iberian Peninsula some traces of the Roman freedom of the river remained, but the rest of Europe had abandoned this ancient and equitable principle wherever two sovereignties divided a navigable stream. These exactions had grown rather than diminished. The Congress of Aix-la-Chapelle refused to modify them. Even France did not protest against these injurious restrictions upon the trade of one of its chief streams. Joseph II of Austria had striven in vain to secure for the provinces in the Low Countries, which he had inherited, the privileges which had been bartered away at the close of the long struggle between Spain and the United States of the Netherlands.

Suddenly there began a movement in all parts of Europe which ended all these exactions. Many factors existed, but the most conspicuous one, directing the attention of the world to the injustice of this interference with the freedom of fluvial trade, was the treaty between France and England in 1763 which had guaranteed to the British colonists the free navigation of the Mississippi. The United States of America both inherited and asserted this privilege. It was made the basis of protest and negotiation, embodied in the treaty of peace, 1783, which established the principle on the American continent that rivers should be free to all their inhabitants, and duly remembered and recorded by us for England in the Louisiana purchase in days when this great stream was believed to be navigable into Canada. Widely commented upon in Europe, the publication of the treaty of 1783 was followed by, and one may fairly say was the proximate cause of, the immediate movement which went into effect before the French Revolution and was soon won, demanding the abolition of all these obstructions to free trade on the rivers of Europe. In 1669 Hamburg had protested in vain to the Duke Christian of Mecklenburg-Schwerin against tolls on the Elbe which prevented navigation and turned trade to land.<sup>2</sup> After the futile attempt of Joseph II from 1781 to 1784, the French Republic on November 20, 1792, made an energetic declaration asserting tolls on the Scheldt and Meuse "contrary to any right"—an echo of Jefferson's phrase.<sup>3</sup> A secret article of the Peace of Campo Formio,

<sup>2</sup>*Histoire du Droit Fluvial Conventionnel*, par Ed. Engelhardt, Aux Temps du Rome et au Moyen Age, *Nouvelle Revue Historique*, 12:735.

<sup>3</sup>*Nouvelle Revue Historique de Droit Français et Étranger*, 13:77; Loi du Novembre, 1790; Traité de la Haye du 16 Mai, 1795.

1797 (p. 87, *ibid.*) freed the Rhine. The 18th article of the Treaty of Ryswick extended this freedom to all nations. In 1798 the City of Ulm pleaded for the freedom of the Danube from the tolls imposed by Austria and Bavaria. Bremen added the same plea against the tolls on the Weser. These various steps and demands culminated in a convention in Paris, August 3, 1805, concurred in by the authorities of the German Empire, in which Russia as well as France were concerned, establishing the principles on which the unrestricted and universal navigation of European rivers has since been urged. These were accepted by the Congress of Vienna and have ruled since. They were the application of the principles which Jefferson had enunciated and which so liberal a thinker and so radical a statesman as Mirabeau had controverted. The despotic rule of Napoleon had returned to these tolls and the ancient exactions Mirabeau defended; but the allied sovereigns, first at Paris and then at Vienna, not only declared the Rhine free, but laid this down as a principle "for all other navigable streams traversing different states," a conclusion drawn by Baron William von Humboldt, the elder brother of the great traveller and explorer, whose name is imperishably associated with the rivers of the New World, soon themselves to be free. Successive conventions of the Powers involved, relieved from toll and restriction the Weser, Ems, Elbe, Rhine, Po and later the Scheldt. These regulations continued to 1831 and were still subjects of international discussion in 1858, and the broad principle first asserted by an American statesman was only finally and fully applied to the Scheldt by the treaty of July 16, 1863.

The Mississippi was the first of American rivers to see the recognition of this principle, which the united colonies had secured while under the English flag, which they had asserted under the flag of the United States, and which successive Secretaries of State, Jefferson and Madison, had warned Spain would become a cause for war if interference were permitted. France and Portugal carried this principle to South America in 1805 by agreeing to the free navigation of the Arawairi in deciding the boundary of Guiana.

The United States, which had begun this work, continued it by its protests against obstruction, first of the St. Lawrence in 1827, and later of the River St. John, which the Treaty of Washington, August 9, 1842, had declared "shall be free and open to both parties and shall in no way be obstructed by either."

In 1852 the United States began its demands for the freedom of the Amazon. An imperial decree, October 2, 1854, abrogated an ex-



clusive concession of steam navigation on the Amazon, and in the course of the next decade the Amazon became free. The final step was taken by the Emperor of Brazil on December 7, 1866, by a decree declaring the navigation of the Amazon open to vessels of all nations to the frontiers of Brazil, of the Tocantins to Cameta, the Tapajos to Santarem, the Madeira to Borba and the Rio Negro to Manáos. On the same date the San Francisco was opened to Penedo. Where but one bank belonged to Brazil, treaties already negotiated were to decide police regulations, and engagements with Peru and Venezuela were duly validated. Regulations in regard to these rivers were decreed on July 31, 1867. Earlier the Platte was opened to all nations in various treaties, of which one, between the Argentine Confederation and Belgium, opened the Parana and Uruguay on March 3, 1860. The Orinoco was later added to the free rivers of the world. Colombia, which had with Venezuela long struggles over the Orinoco, finally secured its liberty and recognized this principle in its constitution May 25, 1864, giving the central government exclusive power to enforce it.

The United States was the first to establish this principle on the Pacific by opening the Yukon on equal terms to British trade as well as its own. Trading rights exist for all nations on the Yang-tse-kiang, and the last of Asiatic rivers to be added to the list is the Karun by decree of the Persian Government in 1888.

The joint act of the Powers assembled at Berlin, which created the Congo Free State, gave free access to the Congo and its affluents, February 26, 1885. Common rights of navigation exist also on the Zambesi.

In just a century, from the earliest assertion of the United States at the beginning of its diplomatic history to the declaration of the freedom of the Karun by Persia, the whole round of great rivers in the world has been made subject to this general principle wherever they cross more than one sovereignty. The peace of the waters is not yet wholly complete. Every international canal should be as free to all nations as is the Suez Canal. Some remnants of ancient restriction remain in one great bay and another, in claims like that of Russia over the Anadir Sea; but the peace of the waters is nearly complete. The universal claim of all nations to all the resources of the earth is accomplished.

This great work of the United States began when it consisted of a little fringe of States bound together by a new Union whose strength

was doubted by the world and whose majestic power was unknown even to those who had accepted its sovereignty. Today when the population of the Republic has risen to one hundred millions and its resources have enabled it to construct the greatest work known to man in the Panama Canal, it is alike incredible and inconceivable that the nation which in the day of small things stood for a great principle and has seen it through a century carried to a triumphant acceptance by humanity, should bar the great waterway between the Atlantic and the Pacific, and should fail to continue at the opening of the twentieth century that peace of seas, straits and rivers which the young Republic began at the end of the eighteenth. It is not to be thought of that the early and intrepid policy of the young Republic which has flowed for a century to the open sea of men's praise should lose itself in the bogs and shallows of self-interest which seek to enforce unequal rights in the use of the Panama Canal. It stands the monument of national achievement. It must not become the tomb of national honor.

The CHAIRMAN. In the address to which we have had the pleasure of listening, Mr. Williams refers to the fact that in the century and a third of our American existence, the United States departed but once from its line of precedents. You will be very glad indeed to listen to the next speaker of the evening, who happened to be, on the occasion referred to, a member of the Bering Sea Commission that sat at Paris and decided adversely to the contention of the United States.

It will be my very great pleasure to yield in a moment to the next speaker, his excellency, Mr. Gram, of Norway, Minister of State, who has crossed the ocean for the express purpose of being present at this meeting and of addressing you upon "The international interest in the settlement of the Panama Canal toll question." Mr. Gram is a lawyer by profession; a judge of experience, not merely in his own country, but in the mixed courts of Egypt; and a tried and trusted arbiter of the nations under the Hague Convention.

It is, I assure you, no common pleasure to be able to introduce to you as the last speaker of the evening a gentleman whose reputation is not only national but international, and who greatly honors us by his presence tonight—his excellency, Mr. Gram of Norway.

## THE INTERNATIONAL INTEREST IN THE SETTLEMENT OF THE PANAMA CANAL TOLL QUESTION.

ADDRESS OF HIS EXCELLENCY GREGER W. W. GRAM,  
*Minister of State of Norway.*

I esteem it a great honor to address the American Society of International Law, and I beg to express my heartfelt thanks to that Society for having, by its kind invitation, given me an opportunity of so doing.

The subjects suggested for discussion at this sitting of the distinguished Society involve, according to the program which was sent to me, problems of wide bearing and of extraordinary importance. It is proposed to examine into the bearing of the principles of international law on the Panama question which has lately arisen and is pressing for a decision. The responsibility incurred by any one volunteering an opinion on that question is enhanced by the fact that it has given rise to some disagreement between the Governments of the United States and Great Britain. An investigation into the legal principles would fail to get at the root of the matter if we do not, in addition, consider the points raised in the diplomatic communications that have been exchanged. I have regarded the invitation of this distinguished Society as being in the nature of a mandate, and on this assumption, of presenting to you my view of the important issues before us, without in any way attempting to arrogate the high mission of an arbiter. I am confident that you will forgive me if, owing to the short notice given to me, I have been obliged to confine myself to a brief discussion of the principal issues—a discussion which I dared to undertake in the hope that I might have opportunity to confer with some other jurists from abroad, present on this occasion.

The international legal relations involved in the Panama question rest on the treaty, concluded on November 18, 1901, between the United States of America and Great Britain, relative to the establishment of a communication by ship canal between the Atlantic and Pacific Oceans.

This treaty, commonly called the Hay-Pauncefote Treaty, states that it is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the treaty, the said government shall have and enjoy

all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

Article 3 of the same treaty contains the following provisions:

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Then follow five other rules concerning different matters connected with the use of the canal, in time of war as in time of peace.

In Article 4 of the treaty it is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the beforementioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

With regard to the text now quoted, this question presents itself:

Does the term "all nations," in Article 3, include the United States?

It has been said, as a proof that the question should be answered in the negative, that the rules are but a basis of neutralization, intended to establish the neutrality which the United States was willing should be the character of the canal, and not intended to limit or hamper the United States in the exercise of its sovereign power to deal with its own commerce, using its own canal in whatsoever manner it saw fit. In the same sense it is argued that the before-mentioned provisions of the treaty only imply a conditional most-favored-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations.

In the first place, I call attention to the fact that the text, the interpretation of which is in dispute, is not in the nature of a provision of municipal law, but is inserted in a treaty concluded between two Powers.

The conclusion of a treaty requires the harmonious coöperation of the contracting Powers, and as the outcome of the negotiations

previously conducted, reciprocal rights and obligations are laid down. It naturally follows that if either Power desires to reserve to itself liberty of action with a view to limiting the operation of the treaty provisions, such liberty of action must have been expressly stipulated for under the treaty. The terms of Article 3 of the aforementioned treaty do not indicate that either of the contracting Powers reserved to itself rights or privileges which would exempt that Power from the conditions established for nations at large.

Next to the wording of the provisions, we must consider the substance of the provision itself and its relation to other provisions. Further, it must be ascertained whether some illustration of the text may be derived from the circumstances under which the treaty was arrived at.

At the opening of Article 3 of the Hay-Pauncefote Treaty it is said that the following rules are substantially the same as those embodied in the convention concerning the Suez Canal.

A comparison of the regulations concerning the matter in the two treaties aforementioned will make clear what is the true construction to be put on those lines.

The Panamá Canal, according to the treaty of 1901, is to be "free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality."

As to the Suez Canal, the treaty of 1888, Article 1, provides that it "shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

"Consequently the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace."

The Hay-Pauncefote Treaty provides that "there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Article 12 of the Treaty of Constantinople provides:

The high contracting parties, by application of the principle of equality as regards the free use of the canal, a principle which forms one of the bases of the present treaty, agree that none of them shall endeavour to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover the rights of Turkey as the territorial Power are reserved.

Article 13 of the same treaty provides:

With the exception of the obligations expressly provided by the clauses of the present treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the firmans, are in no way affected.

The comparison of these clauses seems to me to afford a key to the bearing of the words "all nations" in Article 3 of the Hay-Pauncefote Treaty.

The agreement entered into with regard to the use of the Suez Canal indicates, in my opinion, that the rules laid down in it are binding on *all* Powers, with no exception whatever.

The sovereign rights of the Sultan are reserved, subject, however, to the express limitation which results from the regulations established by the treaty.

This, it may be added, is also the way in which the Suez Canal Treaty has at all times been executed. It has never been suggested that, with regard to the conditions laid down for the use of the canal, either Turkey or Egypt should be in a different position from that of any other nation.

If we bear in mind the wording and the substance of Article 3, on which, as on the central fact, we must take our stand, no argument to the contrary can be derived from the circumstance that the Panama Canal is being constructed by the United States wholly at its own cost, upon territory ceded to it by the Republic of Panama for that purpose.

The relations between the United States and Panama, with regard to the construction of the canal, are regulated by the treaty of November 18, 1903, between those countries.

Article 2 of the treaty provides:

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles; extending to the distance of five miles on each side of the center line of the route of the canal to be constructed.

At the same time the Republic grants to the United States in perpetuity the use, occupation and control of any other lands and waters

outside of the zone which may be necessary or convenient for the purpose.

Article 3 of the said treaty grants to the United States all the rights, power and authority within the zone beforementioned and within the limits of all auxiliary lands and waters which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

The treaty concluded between the United States and the Republic of Panama has, however, been made to harmonize completely with the Hay-Pauncefote Treaty by the insertion in Article 18 of the former treaty of the following provision:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

The contention that the expression "all nations" in Article 3 of the Hay-Pauncefote Treaty includes the United States, receives additional support from the circumstances relative to the genesis of that treaty.

The project of establishing communications, whether by canal or railway, across the isthmus which connects North and South America, had already led to a previous convention between the United States and Great Britain. That treaty—the Clayton-Bulwer Treaty of April 19, 1850—laid down the specific conditions on which such an undertaking might be carried out.

Article 1 of the said treaty contains a declaration of the two governments to the effect that neither the one nor the other would ever obtain or maintain for itself any exclusive control over the said ship canal. In the same article it is said:

Nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess with any state or government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of

the one, any rights or advantages in regard to commerce or navigation through the said canal, which shall not be offered on the same terms to the citizens or subjects of the other.

Article 8 provides :

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but, also, to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

On the occasion of the conclusion of the Hay-Pauncefote Treaty the contracting Powers agreed that the treaty should supersede the convention of April 19, 1850.

At the same time, however, the preamble to the treaty intimates that the two Powers were desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Clayton-Bulwer Treaty to the construction of such canal under the auspices of the Government of the United States, "without impairing the *general principle* of neutralization established in Article 8 of that convention."

The fact, then, is this, that by the treaty of 1901, the United States obtained the right to construct the canal themselves, but on this condition, that the general principle of neutralization established in Article 8 of the convention of 1850 should not be impaired. The principle was that the canal should be open to the citizens and subjects of



the United States and Great Britain on equal terms and should, also, be open on like terms to the citizens and subjects of every other state which was willing to grant such protection as the United States and Great Britain engage to afford.

For the reasons I have given, the aforementioned treaty provisions, whether separately or jointly, do not appear to give any support to the theory that the United States are exempt from the rule prescribing equality for all ships passing through the canal. Nor can anything to the contrary be inferred from the statements made in course of the diplomatic negotiations and parliamentary discussions relative to the purpose and bearing of the Hay-Pauncefote Treaty.

In the speech made by the Honorable Elihu Root in the Senate of the United States on the 21st of January of this year—a speech which is far above any praise or commendation of mine—the Honorable Senator proved that during the discussion of the treaty in the United States utterances have repeatedly been made in direct support of the theory that the construction to be put on Article 3 of the treaty must be consistent with the actual text of that article, its words to be interpreted in a strictly literal sense.

I beg to refer to the extract quoted by Senator Root from Mr. Blaine's instructions, given in 1881, on the occasion of the opening of negotiations with Great Britain for a modification of the Clayton-Bulwer Treaty.

I further beg to refer to the quotations given in Mr. Root's speech from the utterances of Senator Davis in his Report from the Committee on Foreign Relations.

I also refer to the fact, stated in the same speech, that in view of that report the Senate rejected the amendment which was offered by Senator Bard, providing for preference to the coastwise trade of the United States.

I think, however, that this great problem of our day should be considered from a higher point of view.

The ocean is free. It is, from its very nature, exempt from the control of man; all nations, whether great or small, are equal on its waters.

For that reason, the right of navigating the seas appertains to all. Any limitation on the exercise of this right is impracticable. Nor can it be denied that the principle of a free sea agrees perfectly with the interests of all mankind.

However, though man may not be able to bend the ocean to his will, he can assist the benevolent efforts of nature. He can connect the oceans in places where the terra firma raises obstacles in the way of free intercourse and divides the seas from each other. Those are undertakings the greatness and importance of which cannot be measured by a reference to the sum of human energy, insight and labor required by their achievement. They are enterprises for the benefit, not of one nation or another, but of all mankind.

It is just and equitable that those who benefit by a giant achievement of this kind should bear their share of the economic sacrifices entailed by the actual construction of the works as well as by their maintenance in future. Nor can any just objection be raised against an arrangement by which the control of the works is entrusted to the Power which has gained undying glory by overcoming the formidable difficulties in the way of the execution of the project. Nor can anything be said against the same Power undertaking to protect the works after completion, in time of peace as in time of war.

The great object of the work, however, very naturally leaves its stamp upon the work. It is natural that the connection established between two oceans should be placed on an equal footing with those oceans with regard to the principle that the navigation shall be free and open to all and ought to be exercised on equal terms for all.

This is a lofty point of view on which all nations may concur. It is the same idea which seems to have united in a common feeling two of the greatest nations of the world when it is stated that, on entering into the convention, they have not only desired to accomplish a particular object, but also to establish a general principle.

The disagreement between the governments of the two countries which are parties to the aforesaid treaty has chiefly manifested itself in respect of certain provisions contained in "An Act to provide for the opening, maintenance, protection and operation of the Panama Canal, and the sanitation and government of the Canal Zone." This Act was signed by the President of the United States on August 24, 1912.

In this Act, Section 5, it is provided that

No tolls shall be levied upon vessels engaged in the coastwise trade of the United States,

and further:

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce, the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal subject, however, to the provisions of Article 19 of the convention between the United States and the Republic of Panama, entered into November 18th, 1903.

The principle underlying the provisions, here quoted, of the Panama Canal Bill, is, I think, for reasons already given hardly consistent with Article 3 of the Hay-Pauncefote Treaty.

To exempt from payment of tolls vessels engaged in the coastwise trade of the United States, and to fix the tolls to be paid by ships which are the property of American citizens on another ratio than that which is established for the vessels of other countries do not appear to be easy to reconcile with the regulation of the treaty to the effect that there shall be no discrimination against any nation or its citizens in respect to the conditions or charges of traffic, or otherwise.

It has been said that the principle of equality of treatment has no reference to the coastwise trade of the United States, which, in accordance with general usage, is reserved to American ships.

The authority of the United States to make a provision in this respect is not, however, incompatible with its treaty obligation to extend to all the ships making use of the canal an equal treatment. A foreign Power can not, on the strength of the Hay-Pauncefote Treaty, demand for its subjects any right to take part in the coastwise trade of the United States. On the other hand, however, the principle of equality established by the treaty is not subject to any limitation from the fact that it is reserved to each state, with sovereign authority, to issue regulations for the shipping trade of its subjects.

Nor, according to the view here presented, would the rules of the Hay-Pauncefote Treaty be incompatible with the sovereign right of states to grant subsidies to their shipping. There is no need, on this occasion, to investigate in detail how the custom of granting shipping

subsidies works out in the different forms which it may adopt. In the very nature of things, subsidies may be granted to the ships of one nation in such a way as to constitute a violation of the principle of the treaty concerning equality. Such would be the case if the subsidies were paid out of the funds constituted by the canal tolls. This circumstance, however, does not affect the general principle that each country must be free to promote the interests of its shipping by such measures as may be thought convenient for the purpose.

There are other questions of a legal nature which are worthy of an investigation, more especially in such an assembly as that which I have the privilege to address. Is the difference that has arisen concerning the consistence of the Panama Canal Bill of such a nature that one of the parties interested is entitled to claim a decision by arbitration?

We all know the treaty of 1908, we know that it provides that differences which may arise of a legal nature or relating to the interpretation of treaties between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

It has been urged that the canal Act does not fix the tolls, that the proclamation of the President ought to be more closely examined, and that it is still uncertain whether the tolls will injure in their operation British shipping.

It has also been urged that only questions which it may not have been possible to settle by diplomacy are to be referred to arbitration.

Allow me, instead of offering now a direct opinion on this point, to suggest another question: Ought we not to consider these matters in the light of the new situation, of that revolution in the methods of international intercourse which in a near future we shall witness?

That which the nations have been dreaming of for ages, has come true. The earth inhabited by men takes on a new aspect, one tie is cut asunder, but only to give place to a new tie which shall, in a deeper sense of the word, be able to unite the countries. The remotest regions of the world are brought nearer to each other, a new thoroughfare is opened, at which all nations give each other the rendezvous. A new competition sets in, destined, not to afford an

opportunity of a trial of strength, but to aid and facilitate the accomplishment of the tasks which Providence has set the inhabitants of this earth. There is no limit to the progress of which the world is capable; the promotion of progress in the domain of things material as well as in the domain of things spiritual, is the result of the patient coöperation of centuries. In the history of the twentieth century, the accomplishment of the construction of the Panama Canal will form one of the most prominent landmarks, a great nation has added a new link to the mighty chain with which the spirit of solidarity and fraternity has encompassed the globe.

I trust I may be allowed to express a hope that the grand vision which has united all the parties of the American nation in an effort to solve the problem, will remain as powerful as ever when the great work is soon to be handed over in trust to the generations of the future.

One more consideration I would urge.

The conscience and the sense of justice of man is not satisfied if the principles of justice and equality which it is acknowledged should govern the actions of isolated communities are not to be applied to the problems of international relations. It is a change in this direction which is the object of modern efforts to promote the development of international law. The history of international law bears testimony to the prominent place held by the United States in this respect. The United States has taken a leading part in the struggle of mankind to ensure that international differences which it has been found impossible to settle by agreement, shall be referred to arbitration. The United States has, by its actions, shown that it does not shrink from laying important disputes with a foreign Power before an impartial tribunal.

The recapitulation of that which it has been my heart's desire to say on this matter shall take the form of a respectful appeal to consider whether the difference that has arisen is of such importance that it may be possible to misjudge the attitude of the United States toward the great interests affected by this problem.

Entertaining, as I do, a very high opinion of those who are at the head of the affairs of this country, I have no doubt that the decision to which the United States will come will be consistent with the lofty views which the world has been accustomed to see this community constantly urging, in theory and acting up to in practice, whether it is to be done through the adoption of measures which the government

of this country reserves to itself, or by the interpretation of the disputed treaty provisions being referred to arbitration by impartial men.

The CHAIRMAN. I am sure, ladies and gentlemen, I express a sentiment common to all when I extend to his excellency, Mr. Gram, our very sincere thanks for crossing the ocean to be with us tonight and for the expression of his carefully matured opinion on the question of the Panama tolls.

The meeting this evening has been of a general and introductory character. The question of the Panama tolls will be discussed in its various phases at three sessions of the Society, tomorrow morning at ten o'clock, tomorrow afternoon at 2:30 o'clock, and tomorrow evening at eight o'clock. You will note that in arranging the program, questions of a non-controversial character have been assigned to one speaker only, whereas if the question be of a non-historical and of a contentious character, two speakers have been secured, one to speak on the affirmative side and the other to speak on the negative side of the question, so that the views maintained by Great Britain and the United States on this important matter shall be discussed by those most competent.

There being no discussion of the papers this evening, as it is the opening session, although there will be a discussion of each paper at its conclusion tomorrow, I declare the meeting of this evening adjourned.

[Thereupon, at 10:15 o'clock p.m., the Society adjourned until 10 o'clock a. m., Friday, April 25th.]

## SECOND SESSION

Friday, April 25, 1913, 10 o'clock a.m.

The meeting was called to order by Mr. James Brown Scott, Recording Secretary of the Society.

The SECRETARY. Gentlemen, I have the honor to introduce Judge George Gray, Vice-President of the Society, who will preside this morning, and before asking him to take the chair, I would like to make an announcement.

First, the sessions of the Society will end, as usual, with a banquet on Saturday evening at half past seven in this room, the Red Room, and I am hoping that you will be good enough to get your tickets for the banquet sufficiently in advance, so that there will be no trouble about arranging the seats.

[Judge Gray thereupon took the chair.]

The CHAIRMAN. The first address on the program this morning, gentlemen, as you will observe by the printed program, is an address by Mr. E. D. Warfield, President of Lafayette College, on the subject of "Historical account of Isthmian projects."

The SECRETARY. Mr. Chairman, Professor Warfield intended to be here and has sent me a copy of his paper. Unfortunately, however, he has been detained by illness, and I suggest that his paper be read by title and printed in the Proceedings.

The CHAIRMAN. The suggestion of the Secretary will be adopted.

### HISTORICAL ACCOUNT OF ISTHMIAN PROJECTS.

ADDRESS OF PROFESSOR ETHELBERT D. WARFIELD,  
*President of Lafayette College.*

The dream of Columbus was a western waterway from Europe to Cathay. There is no more pathetic figure in history than the old discoverer dying with the illusions and the achievements of his epoch-making life hopelessly confused. None could then distinguish dream from reality. The pathos and power of his life are symbolical of the

slow unfolding of the conditions essential to the attainment of the object of his quest. Great conceptions have been clouded with misconceptions, economic possibilities confused with impossibilities, and policies of world-wide scope have been thwarted and postponed by provincial and personal greed and graft.

Columbus coasting along the western shores of the Caribbean Sea in the delusion that somewhere there was an open pathway to the West was no more misled by his hopes than those who later thought that the resources of the earlier centuries were equal to the task of piercing the isthmus with a practicable ship canal. The problem has steadily outgrown its solution. The occasional fleet of wooden ships, however large they may still loom in the imagination, however rich the booty of Spain's new world conquests which they bore, was as different from the merchant marine and the naval armaments of to-day which await the opening of the canal as the proposed waterway of the age of Charles V was unlike the great engineering feat of our own time. The realization of the dream of the centuries has only served to make clear the inadequacy of the economic and engineering resources even of the nineteenth century to meet all the requirements of the problem.

The Isthmian projects therefore involve chapters of economic and industrial history as well as of national politics and international relations. To even indicate their broad outlines within the scope prescribed for this paper is an almost hopeless task.

The whole western coast line was carefully examined from the earliest years of the sixteenth century in the hope of discovering a strait. The momentous glimpse of the Pacific obtained by Balboa in 1513 gave a fresh impulse to discovery, which was intensified by the confirmation of the rumors with regard to Peru. Almost impossible feats were accomplished in transporting materials for ship-building from ocean to ocean. A permanent settlement was effected upon the original site of Panama, and a wagon road was opened from Porto Bello. Pedrarias Davila (Pedro Arias de Avila) tried to divert traffic to his government by making canals around the rapids on the San Juan River, the first exploitation of the Nicaragua route. Cortez, as soon as he was settled in his conquest, explored the Isthmus of Tehuantepec with a view to a canal.

The great Emperor Charles V entered thoroughly into the spirit of his representatives in the new world, and as early as 1520 ordered



the Isthmus of Panama to be surveyed. Saavedra made plans under his direction, and though they led to no practical result, the interest in a possible artificial waterway was not suffered to rest. In 1534 the Emperor ordered an exploration of the region from the head of navigation on the Chagres River to the Pacific to be made by Pascual Andagoya, who reported that the difficulties were insurmountable and that the undertaking would exhaust the richest treasury in Christendom.

The confidence and courage of the great Emperor ceased to animate the councils of Spain with the accession of Philip II. He seems to have thought that the natural barrier between the oceans was a providential obstacle to the English seamen. His successors reflected in their new world policy the decadence of Spain.

The first appearance of England upon the scene is more representative of her energy and enterprise as a sea power than of her rôle as a colonizer and civilizer. The exploits of the great seamen of the sixteenth century are easier to admire than to justify, and the deeds of Sir John Hawkins and Sir Francis Drake were hideously caricatured by the buccaneer Morgan, who captured and destroyed Porto Bello and Panama in 1671. An attempt at colonization was made by William Paterson, the founder of the Bank of England, on the Isthmus of Darien in 1698, but completely failed. The foundations of the colony of British Honduras and of the claims to a protectorate over the Mosquito coast were laid in the middle of the seventeenth century.

Late in the eighteenth century a Spanish royal commission had taken up the canal question and explored the Nicaragua route. With a just conception of the resources of Spain and the difficulties of the undertaking, the commission made a highly unfavorable report. Two British agents, however, who had been with the expedition, made a report to Great Britain, declaring that a canal was feasible, and impressed the British Government with the desirability of such an undertaking. So when war broke out between England and Spain in 1780 the time seemed opportune for the extension of the hold already secured in Central America, and Nelson was sent to the coast of Nicaragua. In a report he said:

In order to give facility to the great hope of government, I intend to possess the Lake of Nicaragua, which at the present

time may be looked upon as the inland Gibraltar of Spanish America; as it commands the only water pass between the oceans, its situation must ever render it a principal post to insure passage to the Southern Ocean, and by our possession of it Spanish America is divided in two.

The attempted occupation failed because of climatic conditions, which have proved so fatal an element in the canal problem.

Until the nineteenth century no survey of value was made. The economic resources of no country in the world and the commercial value of no canal that could have been constructed were adequate to the requirements: The gradual appreciation of the project as an engineering feat and its value as a commercial outlet began to be understood only in the middle of the nineteenth century.

The wars of liberation completely severed the connection of Spain with the canal problem. The new epoch was characterized by a spirit of enthusiasm for the ideals of liberty and Pan American union; and later by "practical politics," which sought to make as much as possible for the states of Central America out of the world-wide need of an isthmian canal. The Panama Congress of 1826 recognized the value of a canal to promote inter-American commerce. As early as 1825 Señor Antonio José Canaz proposed to the United States that it should coöperate with the Central American Republic in the construction of a canal. And Mr. Clay, full of enthusiasm for the new order, gave assurance of our interest "in an undertaking so highly calculated to diffuse an extensive influence on the affairs of mankind." Mr. Clay further directed our Chargé to collect information with regard to a canal by way of Lake Nicaragua, and in 1826 in his instructions to the representatives of the United States to the Panama Congress in referring to such a canal said that its benefits "ought not to be exclusively appropriated to any one nation."

During the quarter of a century from 1825 to 1850 there was no appreciation of the economic problem, and no accurate estimate of the place the canal would then fill or was destined to fill commercially. Canal projects became the plaything of enthusiasts abroad and practical politicians in Central and South America. The American states were always willing to grant concessions for a "consideration" and prominent individuals and commercial companies were ready to embark in a venture more or less advantageous to them as individuals or

as political actors in the world drama of their times. In 1830 (December 18) the King of the Netherlands entered into an engagement with Nicaragua for the construction of a canal "to be opened on the same terms to all nations." The United States offered no diplomatic objections but directed our representative to secure a share in the stock of the company and of the monopoly which it was to enjoy. In 1835 (March 3) the Senate of the United States passed a resolution asking President Jackson to request the Governments of Central America and New Granada to grant the United States a free and equal right in the enjoyment of any canal that might be constructed. In 1839 (March 2) the House of Representatives passed a similar resolution providing for the sending of an agent of the United States, who reported in favor of the Nicaragua route, but added that on account of political unrest no canal project was feasible. In 1845 the most conspicuous adventurer of the age appears upon the scene, and a concession was granted (January 8) to Louis Napoleon for *Le Canal Napoléon de Nicaragua*. The United States does not seem to have taken special notice of this, but in 1846 (December 12) a treaty was negotiated with New Granada, which shows that it was watching the canal question and beginning to appreciate the political as well as the commercial aspect. This treaty provided not only for equal rights for the United States, but the United States joined in a guarantee of neutrality, which is not only important as the appearance of a new and significant idea, but doubly so because this treaty is the foundation upon which the law which governs the present canal ultimately rests. President Polk in his message explained the position of the United States in guaranteeing neutrality so as to completely satisfy the Senate, and the treaty was unanimously ratified on June 10, 1848. The significance of this treaty in the ultimate construction of the canal is such that a fuller discussion will be reserved till the consideration of the last phase.

In connection with the Senate's resolution of 1835 President Jackson sent Charles Biddle to Nicaragua to make inquiries; but acting with surprising independence, he went to New Granada instead and there obtained a concession granting the citizens of the United States the exclusive right of constructing a canal across the Isthmus of Panama, with the thrifty additional provision that two-thirds of the stock created under the grant should be his own property and that of such citizens of the United States as he might associate with him.

The discreditable character of this action led to a disavowal by our government, but nevertheless, seems to have been contagious. Only a few years later (1849) Elijah Hise was appointed Chargé to Central America with instructions to investigate the British claims to the Mosquito coast and to negotiate commercial treaties. He too exceeded his instructions and negotiated a treaty with Nicaragua with exclusive rights of construction in the United States and her citizens and the right to fortify the canal and station troops in the canal territory. It was further provided that the canal was to be closed to war vessels and to contraband of war. His action was disavowed, and General Taylor sent E. G. Squier, who also concluded a treaty which was never ratified.

With the discovery of gold in California in 1849 a new importance was given to the question. A more regular and rapid means of communication between its Atlantic and Pacific coasts became a matter of urgent concern to the United States. This found its expression in the concession for the building of the Panama Railroad in 1855. Eventually it led to the building of trans-continental railroads and the construction of the canal. It brought into prominence the commercial companies, which since 1826 had been dabbling in canal enterprises. The Central American and United States Atlantic and Pacific Canal Company, incorporated for the purpose of building a canal at an estimated cost of five millions of dollars, had been encouraged by an act of Congress, but it was unable to raise sufficient funds to give body to its undertaking. In 1848 a new company, the United States Atlantic and Pacific Canal Company, was organized, and Cornelius Vanderbilt became its president. It took advantage of the gold fever and established a line of steamers on the San Juan River and Lake Nicaragua and a line of stages from the Lake to the Pacific. The company made money during the first period of the westward movement until superior facilities were provided by the Panama Railroad. This company was reorganized as the Central American Transit Company, and despite legal difficulties maintained its existence until 1869, when it sold out to an Italian company. In the meantime in 1858 a French company headed by Felix Belly was organized and played a part in the canal drama long enough to evoke a declaration from Mr. Cass that the United States would not tolerate interference with American affairs by European nations. His undertaking revived the interest of Louis Napoleon in a canal, an

interest more or less identified with the ideas which led to the French expedition to Mexico in support of Maximilian. The French at last took up the question seriously in 1878 under the leadership of de Lesseps, fresh from his great triumph at Suez. It is impossible to do more than refer to this company,—its organization, its mismanagement, its misfortunes, and its final collapse. It must suffice to say that with an adequate concession, the approval of the civilized world, and the first true conception of the immensity of the undertaking, it revealed the real conditions of success by emphasizing the necessity of probity and leadership in the management of so vast an undertaking.

Until the conclusion of the war for the Union the American people and the Government of the United States did not appreciate the necessity of the construction of a canal as a national undertaking executed by the government itself. The war was scarcely over when Mr. Seward began to use language indicative of the new point of view. President Grant clearly stated it. President Hayes coined the phrase "an American canal under American control." Mr. Blaine threw his weight eagerly into the new policy. Eventually under McKinley and Roosevelt it came to full growth.

In the meantime the engineering problems had been thoroughly studied and reduced to form. Six main routes had been suggested and examined. In order to secure the best possible information President Grant appointed in 1869 the first Inter-oceanic Canal Commission, and, after extensive surveys, it reported in 1876 (February 7) unanimously recommending the Nicaragua route with the Pacific terminal at Brito. Work was actually undertaken by a private corporation, and Senator Bacon maintained a persistent effort to secure the construction of a canal by the government or with government aid. A commission of investigation was provided by Congress in 1895, but with inadequate funds. Another followed in 1897, and in 1899 another with an appropriation of \$1,000,000 to investigate both the Nicaragua and Panama routes. The French company being in possession at Panama, the commission seemed limited to a recommendation of the Nicaragua route. But the collapse of the French company and the unravelling of the diplomatic tangle eventually opened the way for the final adoption of the Panama route for a canal constructed by the Government of the United States.

The treaty with New Granada of 1846 underlies the present undertaking. President Polk in his message transmitting this treaty to the Senate (February 10, 1847) said:

It will be perceived by the 35th article of this treaty that New Granada proposes to guarantee to the Government and citizens of the United States the right of passage across the Isthmus of Panama over the natural roads and over any canal or railroad which may be constructed to unite the two seas, on condition that the United States shall make a similar guarantee to New Granada of the neutrality of this portion of her territory and her sovereignty over the same.

The importance of defining the attitude of Great Britain led to the Clayton-Bulwer Treaty, and under it to the eventual withdrawal of that Power from the field of canal operations. The French undertaking became matter of protest with eventual acquiescence in its work. It collapsed in 1888. Then followed the negotiations resulting in the Hay-Pauncefote Treaty (November 18, 1901); the negotiations for a renewal of the purchased French concession, ending in the failure of Colombia to ratify the Hay-Herrán Treaty; the Panama revolution; the Hay-Bunau Varilla Treaty; and the organization and prosecution of the construction of the canal across the Isthmus of Panama as a national undertaking.

These steps are characterized by notable questions of international law and policy which tempt the chronicler to pause at least to point out their interest and importance. The growing vision of world-wide need and international interest in an isthmian canal must at least be emphasized as a reason for dealing with these questions in a large and generous spirit which prefers the welfare of mankind to the glory or the gain of any nation however great or however beloved.

The CHAIRMAN. The next paper on the program is on the subject of "Comparison of the relative interests of the United States and Great Britain in the Western Hemisphere at the different stages of negotiations," and Mr. Crammond Kennedy, of the Bar of the District of Columbia and of the Supreme Court of the United States, will address the Society on that subject.

COMPARISON OF THE RELATIVE INTERESTS OF THE  
UNITED STATES AND GREAT BRITAIN IN THE WEST-  
ERN HEMISPHERE AT THE DIFFERENT STAGES OF  
NEGOTIATIONS.

ADDRESS OF MR. CRAMMOND KENNEDY, *of the Bar of the District of  
Columbia and of the Supreme Court of the United States.*

MR. PRESIDENT, MEMBERS OF THE SOCIETY, AND LADIES AND GEN-  
TLEMEN :

The subject on which I am to address you is announced in the program as a "Comparison of the relative interests of the United States and Great Britain in the Western Hemisphere at the different stages of negotiations"—in regard to the Clayton-Bulwer Treaty of 1850, and its supersedure by the Hay-Pauncefote Treaty of 1901, now in force.

I should like to say at the outset that, so far as the principle of the controversy in regard to the Panama Canal tolls is concerned, or any other matter of disagreement between the two countries connected with this enterprise, it makes no difference what the comparative interests of the United States and Great Britain have been, or are, or may be, in the use of the waterway which will connect the two great oceans and make them practically one: both governments should do as they have agreed without fear or favor, and the faith of the treaty should, at all hazards, be kept. In this respect the situation is the same as it was in 1881, when, in answer to Mr. Blaine's representations in his circular note of June 24th of that year, on the paramount, political and military interest of the United States in the canal, Lord Granville said briefly in reply, on the 10th of the following November:

I should wish, therefore, merely to point out to you that the position of Great Britain and the United States with reference to the canal, irrespective of the magnitude of the commercial relations of the former power with countries to and from which, if completed, it will form the highway, is determined by the engagements entered into by them, respectively, in the convention which was signed at Washington on the 19th of April, 1850, commonly known as the Clayton-Bulwer Treaty, and Her Majesty's Government rely with confidence upon the observance of all the engagements of that treaty.<sup>1</sup>

<sup>1</sup>The Clayton-Bulwer Treaty and Monroe Doctrine, Ex. Doc. No. 194, Senate, 47th Congress, 1st Session, page 178.

This was the situation then and it is the situation now. The existing treaty is to be kept inviolate and, if changed or modified, it must be only with the consent of both parties.

Although the United States and Great Britain had accepted the principle of neutralization for the canal, with the guarantee of such of the Powers as might join, Mr. Blaine, in his circular note, assailed the Clayton-Bulwer Treaty as binding the United States not to use its military force in any precautionary measure, while it left the naval power of Great Britain perfectly free and unrestrained (as if the treaty had been made merely to be broken), ready at any moment (he said) to seize both ends of the canal, and render its military occupation on land a matter entirely within the discretion of Her Majesty's Government. He informed his lordship and the courts of Europe, through our diplomatic representatives at the various capitals, that the military power of the United States, as shown by the recent civil war, was without limit, and in any conflict on the American continent altogether irresistible. The Clayton-Bulwer Treaty (he said) commanded the Government of the United States not to use a single regiment of troops to protect its interests in connection with the interoceanic canal, but to surrender the transit to the guardianship and control of the British navy. If no American soldier is to be quartered on the isthmus to protect the rights of his country in the interoceanic canal, surely (urged Mr. Blaine) by the fair logic of neutrality, no war vessel of Great Britain should be permitted to appear in the waters that control either entrance to the canal.

Then, referring to the territorial interests of the United States, he said that the States and Territories appurtenant to the Pacific Ocean and dependent upon it for commercial outlet, and hence directly interested in the canal, comprised an area of nearly eight hundred thousand (800,000) square miles—larger in extent than the German Empire and the four Latin countries of Europe combined. And as England (he argued) insists by the might of her power that her enemies in war shall strike her Indian possessions only by doubling the Cape of Good Hope, so the Government of the United States will equally insist that the interior, more speedy, and safer route of the canal shall be reserved for ourselves, while our enemies, if we shall ever be so unfortunate as to have any, shall be remanded to the voyage around Cape Horn.



This was a sudden and impassioned assault upon the neutralization which had been agreed upon in the treaty and championed by his predecessors as the only true basis for making and maintaining the canal. Mr. Blaine seems to have seen a vision and been struck with apprehension that the United States would be undone if it adhered to the Clayton-Bulwer Treaty. But, nevertheless, in the same note, he defended the twin principles of that treaty—"neutralization and equal terms"—in the strongest way, only they were to be maintained by the sole power of the United States, except when she might be at war.

Referring to Colombia, then the sovereign of the Isthmus of Panama, the neutrality of which we had guaranteed by the treaty of 1846 with New Granada, Mr. Blaine remarked:

It is as regards the political control of such a canal as distinguished from its merely administrative or commercial regulation, that the President feels called upon to speak with directness and with emphasis. During any war to which the United States of America or the United States of Colombia might be a party, the passage of armed vessels of a hostile nation through the Canal of Panama would be no more admissible than would be passage of the armed forces of a hostile nation over the railway lines joining the Atlantic and Pacific shores of the United States or of Colombia. And the United States of America will insist upon her right to take all needful precautions against the possibility of the isthmus transit being in any event used offensively against her interests upon the land or upon the sea.

The two republics between which the guarantee of neutrality and possession exists have analogous conditions with respect to their territorial extension. Both have a long line of coast on either ocean to protect as well as to improve. The possessions of the United States upon the Pacific coast are imperial in extent and of extraordinary growth. Even at their present stage of development they would supply the larger part of the traffic which would seek the advantages of the canal. The States of California and Oregon, and the Territory of Washington, larger in area than England and France, produce for export more than a ton of wheat for each inhabitant and the entire freights demanding water transportation eastward, already enormous, are augmenting each year with accelerating ratio.

As to the duty of the United States to Colombia, under the treaty of 1846 (a subject of peculiar interest now), Mr. Blaine assured Great Britain and the courts of Europe that—

There has never been the slightest doubt on the part of the United States as to the purpose or extent of the obligation then assumed, by which it became surety alike for the free transit of the world's commerce over whatever land-way or water-way might be opened from sea to sea and *for the protection of the territorial rights of Colombia from aggression or interference of any kind. Nor has there ever been room to question the full extent of the advantages and benefits, naturally due to its geographical position and political relations on the Western Continent, which the United States obtained from the owner of the isthmian territory in exchange for that far-reaching and responsible guarantee.*

Of course, this is no time, or place, or presence, to raise the question how this treaty with Colombia has been kept. I have referred to this notable state paper because I preferred that the statement of the interest of the United States in the canal should come from a source which could not be suspected of anything like anti-Americanism or "Anglo-mania."

As already remarked, Lord Granville did not enter into any argument with Mr. Blaine; he did not even remind him that it was the United States herself that had proposed the Clayton-Bulwer Treaty and had championed the principle of neutralization and "equal terms" under the guaranty of all the Powers that would join in dedicating the projected water-way between the two oceans to the peaceful commerce of the world. Nor did Lord Granville take up the gauntlet thrown down by Mr. Blaine in respect of the comparative interests of the two nations in the canal, nor refer to the plain intimation that Great Britain and the nations who might join with her and the United States in guaranteeing its neutrality might betray their trust and combine to use the water-way in the event of war against the United States; he simply said that he wished merely to point out that the position of Great Britain and the United States, with reference to the canal, irrespective of the magnitude of the commercial relations of Great Britain with the countries to and from which, if completed, it would form the highway, was determined by the engagements entered into by them respectively, in the convention which was signed at Washington on the 19th of April, 1850, commonly known as the Clayton-Bulwer Treaty, and that Her Majesty's Government relied with confidence upon the observance of all the engagements of that treaty. That confidence has, so far, been justified, for it was with

the full and friendly consent of Great Britain that, after mature deliberation and re-deliberation, in 1900 and 1901, the Clayton-Bulwer Treaty, being recognized by the Senate of the United States as having remained in full force and effect, was superseded by the Hay-Pauncefote Treaty of November 18, 1901, now in force.

Although, as already said, the interpretation of the existing treaty does not depend upon and should not be affected by the comparative interests which the high contracting parties may have in the use of the canal, it may be of service to take a glance at this subject if for no other purpose than to show that Great Britain has the gravest and most abundant reasons for standing firmly on her right to equal terms under the treaty.

In 1850, when the Clayton-Bulwer Treaty was concluded with Great Britain, Texas had been admitted into the Union, the war between the United States and Mexico had been fought, and the United States had obtained, as the price of peace, from her sister republic, the territory that now comprises the States of California, Nevada and New Mexico. The Gadsden purchase, that gave us Arizona, was just about to be made; we had not yet acquired Alaska, Hawaii, Porto Rico or the Philippines, but the Northwest boundary dispute had been settled, and for more than a generation the magnificent domain that Jefferson bought from Napoleon had been incorporated into the Republic.

When the Clayton-Bulwer Treaty went into effect, the British possessions in the Western Hemisphere comprised the northern part of North America extending from the Atlantic to the Pacific, now known as the Dominion of Canada, with a territory of 3,600,000 square miles, one-fifth larger than the United States, exclusive of Alaska, and covering a greater extent of the earth's surface than the United States and Alaska combined.

In addition to this continental empire, are the far-spread islands along the Atlantic coast—Newfoundland, in latitude fifty degrees north, embracing 42,700 square miles; the Falkland Islands, down by the Straits of Magellan in latitude fifty degrees south, 7,500 square miles; and, between these extremes, Bermuda, a little Eden in the ocean; the Bahamas, 4,400 square miles; Barbadoes, 160 square miles; Jamaica, 4,400 square miles; the Leeward Islands, 700 square miles; Trinidad, 1,800 square miles; the Windward Islands, 540 square miles. Then, in the central part of the continent, there is British

Honduras, near the isthmus, with 8,600 square miles, and, southwards, British Guiana, with 90,200 square miles, bounding with Venezuela and Brazil. And all this outside the empire of India with its million and a half square miles and its 240 million souls, the new united nation in Africa, and the growing commonwealths of Australasia coming to the forefront of the civilization of our age.

In 1850, when the Clayton-Bulwer Treaty was made, these British continental and insular possessions in the Western Hemisphere had a population of nearly three million (3,000,000) souls. In 1901, when the Hay-Pauncefote Treaty was negotiated, the population of these regions had more than doubled, the number amounting at that time to seven millions and a half; and now, when the question of the canal tolls is under discussion, it has increased to ten millions (10,000,000). So much for the extent of her territory and the number of her subjects in the Western Hemisphere at these three periods.

The development of these territories and the increase in their population, who can foretell? Canada's external trade for 1911-1912 was of the value of \$874,637,794, comprising \$120,534,000 in exports to the United States and \$368,145,107 in imports from the United States.

The population of the United States in 1850 was 23,191,876; in 1900, 75,994,575; in 1910, 91,972,266; at present (estimated), 96,000,000.

In 1850 the value of the external trade of Great Britain, as shown by her exports and imports for that year, amounted to 177,750,000 pounds sterling, or \$888,750,000, the imports amounting to 95,250,000 pounds sterling, or \$476,250,000, and the exports amounting to 82,500,000 pounds sterling, or \$412,500,000. At that time the external trade of the United States amounted to \$762,288,500, compared with Great Britain's total of \$888,750,000.

In 1900, when the Hay-Pauncefote Treaty was under negotiation, the external trade of Great Britain had increased to 877,448,917 pounds sterling, or \$4,387,244,585; and in 1911 it had reached the enormous and almost inconceivable value of 1,237,035,959 pounds sterling, or approximately \$6,000,000,000.

The external trade of the United States for the fiscal year ended June 30, 1912, amounted to \$3,857,587,343, somewhat short of four billions, or less by \$2,000,000,000 than that of Great Britain.

Nearly all this mass of British merchandise was carried in British

vessels and much of that of the United States and other countries, besides. This brings us to a comparison of the shipping of the two countries.

So much of the energy and capital of Great Britain has gone into the ocean-carrying trade that she does about half the shipping business of the world. In 1911, 4,969 British vessels passed through the Suez Canal, carrying sixty-three per cent of the 18,000,000 net tons for that year, which was about the average of the British percentage for the four years preceding. Great Britain pays more than half the tolls on the Suez Canal, and, in view of her external trade in imports and exports and the number and tonnage of her merchant vessels, it is not improbable that she will pay more than half the tolls on the Panama Canal, or a very large proportion, for many generations to come.

In 1900, when negotiations for the Hay-Pauncefote Treaty were in progress, Great Britain had 7,903 seagoing steamers of 12,149,090 gross tonnage, while the United States had 690 seagoing steamers of 878,564 gross tonnage; that is, Great Britain had more than eleven seagoing steamers to our one and more than fifteen times our tonnage.

In 1910, the United States had 1,073 seagoing steamers of 1,641,919 gross tons, and Great Britain had 9,837 seagoing steamers of 18,059,037 gross tons, or more than nine times as many seagoing steamers as the United States, with nearly twelve times the tonnage.

In those ten years, however, notwithstanding the enormous increase of ships and tonnage in Great Britain, the proportionate increase in such vessels had been greater in the United States. Two years later (in 1912), Great Britain had 10,014 seagoing steamers with 19,202,770 gross tons, and the United States had 1,171 such vessels with 1,797,029 gross tons—about the same proportion as in 1900. The increase of United States vessels and tonnage in the Lakes in those twelve years was very great, but, nevertheless, the combined tonnage of United States vessels on the sea and the Lakes was less than one-fourth of the tonnage of Great Britain on the sea alone. German sea-steamers and tonnage increased greatly from 1900 to 1912, but at the latter date was less than a quarter of Great Britain's. Germany's sea tonnage last year (4,276,191 gross tons) was more than double that of the United States and somewhat greater than the combined sea and Lake tonnage of the United States.

In 1900 nearly half of all the seagoing steamers in the world were

British, the figures being for all the world, 15,898, of which 7,903, or just about half, were British. The tonnage of seagoing steamers for all the world in 1900 was 22,369,358 gross tons, of which 12,149,090, or about one million more than half, was British. This proportion, notwithstanding the enormous increase of seagoing steamships and tonnage of other countries, has been pretty nearly maintained, so that in 1912 (last year), of a total tonnage of 40,518,177 gross tons, carried by seagoing steamers, nearly a half (19,202,770 tons) was British.

The canal will not only shorten the distance between the United States and the west coast of South America, but also between that coast and Great Britain.

The Spanish-American republics have always had, deep down, a friendly feeling for Great Britain because of her sympathy in their struggle for independence. Canning, without an ally, warned the Holy Alliance against any attempt at the resubjugation of the Spanish colonies, and suggested a concerted warning on the part of the United States, which shortly afterwards took form in President Monroe's celebrated declaration. "The British Legion," composed of volunteers, some of whom had fought at Waterloo, performed such deeds of devotion and valor in the service of Spanish-America that Bolivar hailed them, after they had saved his army from rout, and won the decisive victory of the war of independence, at Carabobo, as the saviors of his country; while the Republic of Chile owed its liberation from Spain largely to the prodigies of valor and skill of that dauntless sailor, Lord Cochrane, who did at sea for the Chilean patriots what another countryman of his, Paul Jones, had done in an earlier generation for the American patriots in their struggle with their mother country for independence and the right to govern themselves.

In 1911, Chile's imports from Great Britain amounted to \$32,356,420 and from the United States \$15,491,846; Chile's exports to Great Britain were \$21,684,390, and to the United States, \$20,164,848; Peru's imports from Great Britain, in 1911, were \$7,456,960, and from the United States, \$5,522,459; Peru's exports to Great Britain were \$15,753,315, and to the United States, \$10,124,069; Bolivia's imports from Great Britain, in 1911, were \$1,690,315, and from the United States, \$991,525; Bolivia's exports to Great Britain were \$7,931,885, and to the United States, \$9,884. The trade of the United States and Great Britain with Ecuador, in 1911, was about equal.

The commercial interests of Great Britain and the other maritime Powers being as extensive as they are in the united oceans, why not return to the original idea of dedicating the connecting water-way to the peaceful commerce of the world, under the guarantee of its permanent neutrality by the United States and all the nations using the Isthmian Canal, in recognition of the freedom of the seas, the gospel of commerce and the solidarity of mankind?

But, in any event, if we cannot agree with Great Britain on the true meaning and intent of the Hay-Pauncefote Treaty, let us rid ourselves of the unworthy fear that impartial arbitrators cannot be found—a fear which our own experience with international arbitration does not justify—and submit our differences to this peaceful method of settlement, as we have bound ourselves by treaty to do.

The CHAIRMAN. The printed program will be resumed later, and in the meantime, a paper by Mr. Chandler P. Anderson, recent Counsellor for the Department of State, will be read on the issues based upon the diplomatic correspondence.

#### THE ISSUES BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO PANAMA CANAL TOLLS, AS RAISED IN THE RECENT DIPLOMATIC CORRESPONDENCE.

ADDRESS OF HON. CHANDLER P. ANDERSON, *formerly Counsellor for the Department of State.*

It has seemed desirable to the committee in charge of the program for this meeting of the Society that, as a preliminary to the discussion of the Panama Canal tolls questions which are included in the program, a brief outline should be presented showing the exact issues between the two governments in that controversy as raised in the diplomatic correspondence, and the arguments which have been advanced on both sides in support of their respective contentions. It is for this purpose, rather than for the purpose of weighing the value of these arguments, that this paper has been prepared.

Before taking up the issues which have been raised in the diplomatic correspondence, it is important to have in mind the following considerations:

Inasmuch as the United States and Great Britain are the only parties to the Hay-Pauncefote Treaty of November 18, 1901, Great Britain alone of all nations is entitled to question the course adopted by the United States under that treaty, but even Great Britain is not entitled under the terms of the treaty to question the course adopted by the United States toward other nations with reference to the use of the canal so long as that course involves no discrimination against Great Britain. Great Britain has no authority under the treaty or otherwise to speak for other nations on the subject of the canal tolls, and is not concerned with the attitude of the United States toward other nations in dealing with this matter except as Great Britain's own interests are affected thereby. The attitude of the United States toward other nations will unquestionably be that best adapted for securing their observance of the rules adopted by the United States for the use of the canal, the purpose of which rules is to carry out the traditional policy of the United States for the neutralization of the canal. In this connection, however, it is of interest to note that there is nothing in the treaty which would prevent the United States from granting equal treatment to any other nation even if that nation does not observe the rules, the observance of which would ensure equal treatment. Moreover, it is open for the United States to make with any other nation any arrangement which is mutually agreeable on the subject, and the only interest of Great Britain therein is that there shall be no discrimination against British interests.

It is clear from these considerations that any discussion between Great Britain and the United States on the subject of canal tolls must be limited to the question of discrimination against British vessels, and it will be found upon examining the diplomatic correspondence that this limitation has been recognized by Great Britain.

There has apparently been considerable confusion in the widespread discussion about canal tolls which has been going on for the past eight months in this country as to the exact contentions of both governments and the real question at issue between them. A large part of this discussion has been directed to the question of whether the United States is not at liberty under the treaty to do what it pleases in regard to the payment of tolls by its own vessels in its own canal. As a matter of fact, this contention is not made by Great Britain, and there is nothing in the treaty which would justify any such contention. The United States is clearly entitled to exempt its



own vessels, either of war or of commerce, whether engaged in the coastwise or foreign trade, from the payment of any tolls, and likewise it is entitled to refund tolls exacted from those vessels. The question at issue is not whether that can be done, but whether the United States, having exempted its own vessels from the payment of tolls, is at liberty under the treaty to exact tolls from British vessels so long as Great Britain observes the rules adopted by the United States in the treaty.

That issue is not one which should arouse bad feeling or justify the charge of bad faith on either side, for it involves at most only a question of pecuniary damages, and does not present a situation under which the United States would gain any advantage by postponing its settlement until after the canal is opened. If it should finally appear that under the treaty the United States was not entitled to impose tolls upon British vessels when United States vessels are not subjected to the same treatment, Great Britain would have a claim against the United States for the amount of the tolls improperly paid by British vessels. Clearly, therefore, it is not a case where an immediate settlement is necessary in order to prevent an irreparable injury, for there can be no irreparable injury in enforcing a law when the damages can be measured by the payment of money improperly collected. Obviously it would be more convenient for the United States to have this question determined before the canal is opened and before tolls are collected, which would have to be refunded if this question should be decided against the United States; but even if it should be so decided, either before or after the canal is opened, in either case it would remain for the United States alone to determine whether equality of treatment should be secured by imposing equal tolls upon American vessels or by exempting British vessels equally with the American vessels from the payment of tolls.

The fundamental question underlying this controversy is whether or not the rules adopted by the United States under Article III of the Hay-Pauncefote Treaty "as the basis of the neutralization of the canal" were intended to apply to the United States as well as to other nations.

If these rules are understood as not applying to the United States, then their adoption by the United States is nothing more than a declaration of policy to the effect that the United States will so regulate and manage the canal, under the authority reserved in Article II, as to

insure, in accordance with the first of these rules, that "the canal shall be free and open to the vessels of commerce and of war of all nations *observing these rules*, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise," and also that "such conditions and charges of traffic shall be just and equitable."

This is the interpretation which the Government of the United States has accepted as expressing the true intent and meaning of this treaty, the effect of which under this interpretation has been aptly described as insuring to other nations "conditional favored-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the United States gives to its own nationals, but the treatment which it gives to other nations."

Great Britain, on the other hand, although apparently admitting that none of the other rules adopted by the United States as the basis of neutralization apply to the United States, nevertheless contends that the first of these rules does apply to the United States as well as to other nations, and that by adopting it the United States has imposed upon itself an obligation to treat its own vessels and the vessels of any nation observing these rules on terms of entire equality, "so that there shall be no discrimination against any such nation, or its subjects or citizens," etc. In contending for this interpretation, however, Great Britain has recognized the necessity for determining what constitutes discrimination and particularly whether or not inequality of treatment in favor of vessels of war of the United States and of vessels of commerce engaged in the coasting trade of the United States would constitute discrimination against British vessels under this clause.

So far as other nations are concerned the British position is understood to be that this clause "embodies a promise on the part of the United States that the ships of all nations which observe the rules will be admitted to similar privileges" as enjoyed by the ships of the United States and Great Britain.

In support of the British contention that the words "all nations observing these rules" as used in Rule 1 include the United States, and therefore that British vessels using the canal are entitled to equal treatment with those of the United States, the only argument advanced by Great Britain is that the general principle of neutralization

established by Article VIII of the Clayton-Bulwer Treaty, as the basis of which principle the United States adopted these rules, is in effect nothing more than a general principle of equality of treatment.

Before taking up this argument it is necessary to examine briefly the provisions of Article VIII of the Clayton-Bulwer Treaty, and trace their connection with the present treaty. Article VIII of the Clayton-Bulwer Treaty recites:

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a *general principle*, they hereby *agree to extend their protection, by treaty stipulations*, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America.

The first seven articles of that treaty related exclusively to inter-oceanic communications across Central America, and it was distinctly understood by Great Britain in making that treaty that the Isthmus of Panama was not regarded as a part of Central America. This article of the treaty, therefore, is the only part of the treaty which had any relation to a canal across the Isthmus of Panama. The significance of this is that this article expressed the only rights Great Britain ever had in relation to the Panama Canal route, so that Great Britain has actually sacrificed nothing by abrogating the rest of the Clayton-Bulwer Treaty. In other words, if the Clayton-Bulwer Treaty were in force today Article VIII is the only part of it which would apply to the Panama Canal, and in so far as the effect of Article VIII has been changed by the Hay-Pauncefote Treaty, it will be found that these changes have been made at Great Britain's suggestion.

The article then continues—

In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

: It is evident from this clause of the article that the agreement to extend protection was a conditional one, and the condition was that charges imposed on traffic should be approved by both governments as just and equitable, and that the canal should be open to their citizens and subjects upon equal terms.

It is clear that the right to equal treatment went hand in hand with the obligation to extend protection, but the general principle established by this article related primarily to the protection of the canal, the object being to secure its neutralization, and as an inducement to granting protection it was provided that equality of treatment should go with it. Clearly neutralization as used there meant exemption from interference, and equality of treatment was only incidental as an inducement to non-interference.

That both governments understood that neutralization rather than equality of treatment was the general principle adopted by Article VIII of the Clayton-Bulwer Treaty is evident from the fact that the preamble of the Hay-Pauncefote Treaty of 1901, as well as the preamble of the earlier treaty of 1900, characterized that general principle as "the general principle of neutralization established in Article VIII of that convention." The connection established by Article VIII of that convention between the obligation to protect the canal and the right to equal treatment is also recognized and carried into the first Hay-Pauncefote Treaty of 1900 by the second article of that treaty, which provides:

The high contracting parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer convention, adopt as the basis of such neutralization the following rules, etc.

The first of these rules is as follows:

The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

It will be observed that in this treaty Great Britain joined with the United States in adopting rules which were to furnish the basis of neutralization, so that in that case both governments were equally com-

mitted to the neutralization of the canal, and the rules recognized that in consequence of such joint obligation the vessels of both governments were entitled to equal treatment. As part of this policy of coupling equal treatment with the obligation of protection, that treaty also provided in Article III that—

The high contracting parties will, immediately upon the exchange of the ratifications of this convention, bring it to the notice of the other powers and invite them to adhere to it.

That treaty, it will be remembered, was rejected by the United States Senate, and was subsequently amended materially before it was agreed upon in its present form. Certain of these amendments are of the utmost significance in connection with the questions under consideration, and show conclusively that the policy which had previously been adopted with respect to the protection of the canal was completely reversed by the later treaty. The article of the earlier treaty requiring the two parties to bring it to the notice of other Powers and to invite them to adhere to it was entirely omitted from the new treaty. This provision had been objected to by the Senate, and was omitted for that reason, and in consequence of its omission Great Britain insisted upon being relieved from the obligation of protecting the canal, which it had assumed in joining with the United States in adopting the rules of neutralization. The reason for relieving Great Britain of this obligation is found in a statement made by Lord Lansdowne in an instruction by him to Lord Pauncefote in the course of the negotiations wherein he says, in effect, that the amendment striking out the provision for the adherence of other Powers leaves the neutrality of the canal dependent upon the guarantee of the two contracting Powers, which would place Great Britain at a marked disadvantage in comparison with other Powers which would not be subjected to the self-denying ordinances which Great Britain is desired to accept. Accordingly the treaty was further amended so that the United States alone, instead of the United States and Great Britain jointly, adopted the rules of neutralization, and that this change was intended to relieve Great Britain of any obligation to protect the canal is evident from the position taken by the British Government in the recent diplomatic correspondence, in the course of which it is stated—

It certainly was not the intention of His Majesty's Government that any responsibility for the protection of the canal should attach to them in the future.

In this connection it will be remembered that the Hay-Pauncefote Treaty was entered into pursuant to Article VIII of the Clayton-Bulwer Treaty, whereby, in order to establish a general principle, they agreed "to extend their protection by treaty stipulations to any other practicable communications" which included the Panama Canal as now constructed. The obligation to protect, as has already been shown, was conditional upon equality of treatment, and Great Britain's repudiation of responsibility for the protection of the canal would seem to be wholly inconsistent with the stipulations of Article VIII above-mentioned, unless it was understood that Great Britain was not to receive equal treatment with the United States under the new treaty.

The changes by which the United States alone adopted the rules, and thereby undertook the whole responsibility of upholding them and maintaining the neutralization of the canal, made some changes in the rules themselves necessary. It appears from the diplomatic negotiations which resulted in the second Hay-Pauncefote Treaty that in order to make Rule 1 conform to the situation resulting from the amendments above noted, Great Britain had suggested that in Rule 1, after the words "all nations" there should be inserted the words "which shall agree to observe these rules," so that Rule 1 would then read:

The canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules.

Clearly the United States, as the nation which adopted the rules, was the nation with which the agreement to observe them would necessarily be made, and therefore it is evident that in proposing this amendment Great Britain understood that as a result of the proposed amendments the United States, as the nation adopting these rules, would stand apart from all other nations, and that "all nations" referred to in these rules did not include the United States. The exact form of amendment thus proposed was not agreed upon, but instead of the words "all nations which shall agree to observe these

rules" the words "all nations observing these rules" were substituted. With reference to this change, Lord Lansdowne made the following statement in the course of the negotiations:

His Majesty's Government were prepared to accept this amendment which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than other powers, while they [the United States] stopped short of conferring upon other nations a contractual right to the use of the canal.

Having thus briefly reviewed the development of the policy of neutralization as established in Article VIII of the Clayton-Bulwer Treaty and as understood by the parties in the later negotiations resulting in the second Hay-Pauncefote Treaty, it is convenient now to examine the argument which has been advanced by Great Britain to show that the policy of neutralization adopted by the United States in this treaty imposes upon the United States the obligation to treat British and United States vessels upon equal terms in the use of the canal. The argument briefly is that the word neutralization, as used in Article III, has the same sense as in the preamble of the treaty which recites that both governments are desirous of facilitating the construction of the canal "without impairing 'the general principle' of neutralization established in Article VIII" of the Clayton-Bulwer Treaty, which policy of neutralization is admitted to have comprehended both equality of treatment and the obligation to protect the canal, and that inasmuch as Great Britain has now been relieved from any responsibility for the protection of the canal, neutralization must therefore refer in the treaty to a system of equal rights; therefore the United States can have no more rights than other nations, and consequently is one of the nations required to observe the rules adopted by the United States, so that Great Britain and the United States are in the same situation, and British vessels are entitled to equal treatment with the vessels of the United States.

As stated at the outset, it is not the purpose of this paper to weigh the value of the arguments advanced on either side, but in any event it would be premature to attempt to deal fully with the arguments on this point, because the Government of the United States has not as yet stated the arguments relied upon to support the position which it has taken in opposition to the British contentions. The reply of

the Government of the United States to the British argument so far has been confined to the statement by Secretary Knox, in the recent correspondence on the subject, that—

This Government does not agree with the interpretation placed by Sir Edward Grey upon the Hay-Pauncefote Treaty, or upon the Clayton-Bulwer Treaty, but for reasons which appear herein-below it is not deemed necessary at present to amplify or reiterate the views of this Government upon the meaning of those treaties.

The conclusion reached by Great Britain, as above stated, that the same treatment extended to American vessels should be extended to British vessels, has been made the basis by Great Britain for objecting to certain features of the Panama Canal Act adopted by Congress last year; and the views of the British Government in support of these objections have been fully presented in the recent diplomatic correspondence.

It appears from this correspondence that apart from a reservation made by Great Britain of the right to examine further one provision of the Act and to raise such contentions as may seem justified only three objections are made, which may be briefly stated as follows:

- (1) That under the Act no tolls are to be levied upon ships engaged in the coastwise trade of the United States.
- (2) That the Act appears to confer upon the President authority in fixing tolls to discriminate in favor of ships belonging to the United States and its citizens as against foreign ships.
- (3) That the Act exempts from the payment of tolls the vessels of the Republic of Panama, pursuant to the provisions of Article XIX of the treaty of 1903 between the United States and Panama.

The reply of the United States to these objections has been fully stated in Mr. Knox's note on the subject, dated the 17th of January last. It appears from that note that the position of the United States with reference to the third of the objections above enumerated is that, for reasons which depend upon considerations outside of the terms of the treaty, this question is one which must be settled between the two governments independently of the treaty provisions. The correspondence does not fully disclose what these reasons are, but apparently they rest upon some previous discussion and understanding between the two governments with regard to the subject which have not yet been made public, and it is therefore impossible to



discuss here the arguments in support of the position of either government on this point.

With reference to the other two objections, the United States has taken the position that, if it is right in its contention that Rule I does not apply to American vessels, then the exemption from tolls of its coastwise trade and its ships of war and even its ships of commerce engaged in foreign trade would not be contrary to its treaty obligation. As has already been stated, the argument of the United States in support of this position has not as yet been presented, because it appeared to the Government of the United States that even if Rule I should be regarded as applying to American vessels, nevertheless Great Britain had failed to show that under the provisions of the Canal Tolls Act and the President's proclamation there was or would be any discrimination against British vessels.

In regard to the objection that under the Act the President had discretion to discriminate in favor of ships of the United States or its citizens, the reply of the United States was that this as yet had not been done, and that it would be premature to discuss that question so long as it rested merely on a possibility of what might happen rather than upon an announced intention to discriminate, or some specific act of discrimination.

In this connection the United States raised the question of whether the objection under consideration was to be understood as applying to war vessels and government vessels of the United States, and the British position on this question has not yet been announced. The significance of this question is that if Great Britain admits that Rule I does not apply to United States war vessels it amounts to an admission that it does not apply to United States vessels of commerce, for vessels of war and vessels of commerce are put on precisely the same footing in Rule I. Clearly, however, there is no point in collecting tolls from the United States vessels of war, inasmuch as their payment would be merely a matter of bookkeeping in the government accounts. Moreover, Great Britain has already admitted that the rest of the rules adopted by the United States in Article III, which chiefly relate to war conditions, do not apply to the United States, and it is perhaps difficult for Great Britain to establish a distinction justifying the application of Rule I to the United States and the application of the rest of the rules only to other nations.

In reply to the first objection—that under the Act no tolls are to be

levied upon ships engaged in the coastwise trade of the United States—the position taken by the Government of the United States was that, in view of the fact that no foreign vessels were permitted to engage in the coastwise trade of the United States, an exemption of American vessels engaged in that trade was in no sense a discrimination against foreign vessels so long as this exemption was restricted to bona fide coastwise trade. Great Britain has admitted that the United States is at liberty to grant a subsidy to its vessels whether engaged in coastwise or foreign trade, and apparently has admitted in principle that a subsidy may be granted indirectly by an exemption from the payment of tolls if that should be done without producing an increase in the rate of tolls imposed upon British vessels; but it is contended by Great Britain that “if any classes of vessels are exempted from tolls in such a way that no receipts from such ships are taken into account in the income of the canal there is no guarantee that the vessels upon which tolls are being levied are not being made to bear more than their fair share of the upkeep.” In making this contention the British Government apparently was under the impression that the President, in determining the rate of tolls, would not take into account the tonnage of American coastwise vessels, and therefore that the toll rate would be higher than if those vessels were subjected to the payment of tolls. That the British Government was under a misapprehension with regard to this matter has been clearly shown by the reply of the United States, which pointed out “that the tolls which would be paid by American coastwise vessels, but for the exemption contained in the Act, were computed in determining the rate fixed by the President,” and the figures are given showing that the estimated net tonnage upon which the tolls fixed in the President’s proclamation were based included the tonnage of American coastwise vessels.

For these reasons the Government of the United States contended that there had as yet been no discrimination, and that there was nothing in the situation to show that the United States intended to discriminate against British vessels, either by subjecting them to inequality of treatment or by imposing upon them unjust and inequitable tolls.

From the foregoing brief outline of the issues and arguments presented in the diplomatic discussion of this controversy it will be seen that it is still an open question as to whether the two governments

cannot harmoniously settle their differences with regard to this treaty without resorting to arbitration. Great Britain has proposed arbitration, and the United States has not as yet accepted that suggestion, but it has not refused to do so, having taken the position that the issues between the two countries should first be more clearly defined, and that arbitration at present would be premature, because the controversy has not yet passed beyond the stage when it could profitably be dealt with by diplomatic negotiation.

To sum up the whole situation, the United States and Great Britain differ as to the meaning and effect of the treaty in its relation to certain features of the Panama Canal Act. Great Britain has asked that these differences should be settled by arbitration, and the United States has replied that there is as yet no necessity for resorting to arbitration, for even under Great Britain's interpretation of the treaty it is believed that they have failed to make out a case showing any violation of treaty obligations. In other words, the United States in effect has interposed a demurrer to the British complaint and contended that even under the British interpretation of the Hay-Pauncefote Treaty the provisions of the Panama Canal Act, when taken in conjunction with the President's proclamation, are not in conflict with that treaty; and that the objections advanced by Sir Edward Grey do not present any questions which, under the terms of our arbitration treaty with Great Britain, can fairly be regarded as requiring submission to arbitration at the present stage of the discussion.

The CHAIRMAN. The next matter interpolated into the printed program is a paper by Mr. Richard Olney, whom we all remember as the former Secretary of State. Mr. Olney's paper will be read by Mr. Walter S. Penfield, of the Bar of the District of Columbia.

#### PANAMA CANAL TOLLS LEGISLATION AND THE HAY-PAUNCEFOTE TREATY.

ADDRESS OF HONORABLE RICHARD OLNEY, *formerly Secretary of State.*

In construing the Hay-Pauncefote Treaty it is necessary to remember that there have been several different phases of American opinion and American policy touching the ownership, construction, maintenance, and use of the canal. The canal has always been conceived of as a work of world-wide interest and importance, which all nations

without exception or discrimination should be able to use, subject of course to all rights of the owner of the canal including that of charging reasonable tolls. Among the earliest declarations of policy by the United States Government, perhaps the earliest, was an intimation that the work should be accomplished, not by "the separate and unassisted efforts of any one Power" but "by common means and united exertions"—whether of all civilized Powers or of American Powers exclusively is not perhaps clear. Secretary Clay's idea that the canal be built by a combination of the Powers interested seems never to have taken any real root.

This first phase was succeeded by the view that the canal should be built by the state owning the route of the canal or by a company or association having from the state the necessary concessions for that purpose. The United States was to assist by appropriate guaranties, and by the treaty with New Granada of 1846, in consideration of New Granada's granting citizens of the United States equal treatment with citizens of New Granada as respects any mode of transit across the isthmus, the United States guarantied the perfect neutrality of the isthmus and also New Granada's rights as sovereign and owner of the isthmus.

A third phase of American opinion and policy appears four years later in a treaty then made with Great Britain. The United States was moved to enter into it by various considerations; by the improbability of the canal being built by the territorial sovereign; by Great Britain's claim of a protectorate over the eastern terminus of the Nicaraguan route, then universally accepted as the most eligible route; and by the natural and reasonable belief that financiers would more readily engage in the canal enterprise if Great Britain joined the United States in becoming sponsor for the safety and neutrality of the canal and for its equal use by all nations. The outcome was the famous Clayton-Bulwer Treaty, the essential features of which are these:

First, a canal built by the state owning the canal route or by its concessionaires.

Second, a compact by the parties that neither will build or take part in building the canal, directly or indirectly, nor obtain nor maintain exclusive control over it.

Third, a specific agreement as to the modes in which both parties may aid in the construction of the canal—as by each using its influence

for such construction with local governments and for the establishment of a free port at each end of the canal, and by each undertaking to protect the canal while in process and after completion, to guaranty its neutrality, and to thus safeguard the capital invested.

Fourth, an undertaking by each to enter into contracts with Central American states with the view to carry out the great purpose of the treaty, to wit, the construction of a ship canal between the two oceans "for the benefit of mankind and on equal terms to all"—and for the purpose of protecting the same.

Fifth, enjoyment by the citizens or subjects of each party of the same "rights or advantages in regard to commerce or navigation through the canal"—charges and conditions of traffic to be approved as just or equitable by the governments of the contracting parties.

Sixth, an invitation to all friendly states to join in contributing to the construction of the canal, coupled with the declaration that the equal terms and conditions secured to the citizens or subjects of the contracting parties shall be enjoyed by the citizens and subjects of every other state "*which is willing to grant thereto [to the canal] such protection as the United States and Great Britain engage to afford.*"

The two notable features of this phase of American canal policy are, *first*, the self-denying ordinance preventing the United States or Great Britain from building or controlling the canal, and, *second*, the clear recognition of the right of a state constructing on its own territory an artificial water-way like the canal to dictate the conditions of its use—as by permitting the use to some parties on condition of their undertaking to protect the canal and denying its use to other parties not willing to undertake such protection.

The next phase of American canal opinion and policy was foreshadowed as early as 1869, when Secretary Seward officially expressed the "very deliberate conviction" (1) that "henceforth neither any foreign government nor the capitalists of any foreign nation, except the Government and capitalists of the United States, will ever undertake in good faith to build a canal across the Isthmus of Darien"; (2) that "the neutrality most desirable for Colombia is to be found in a combination of the power, authority, and influence of the United States of America and the power, authority, and influence of the United States of Colombia to protect the canal and make it productive of the largest commercial benefit to all nations"; and (3) that "not only would the United States be unwilling to enter into an

entangling alliance with other foreign nations for the construction and maintenance of a passage through the isthmus, but also that the idea that other commercial Powers could and would consent to enter into a combination with the United States of America for that purpose, is impracticable and visionary." About the same time a convention was actually negotiated at Bogota by which the United States was to build the canal. On various grounds not necessary to state, the convention failed of ratification at Washington.

Meanwhile, and before Secretary Seward's prophetic words were generally accepted as verity, there ensued the de Lesseps attempt to construct the canal over the Panama route. The final abandonment of that attempt in 1889 forced upon the country the conviction that Secretary Seward was right and that if the canal was to be built it must be built by the United States, both because the United States was the only American Power with the necessary resources and because the construction and control of the canal by any European Power would conflict with our settled policy respecting European interference in American affairs. President Hayes, in a special message to Congress in March, 1880, justly interpreted American sentiment by declaring—"The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European Power or to any combination of European Powers." He condensed the whole argument for the policy into the fewest words by adding that the canal would be "virtually a part of the coast line of the United States." President Cleveland, in his message of December, 1885, was equally explicit as to the inadmissibility of any control of the canal by an European Power.

The final phase of American opinion and policy being that the United States must build and control the canal and that any share in its construction or control by any European Power was to be excluded, the first step to be taken obviously was the removal of the obstacle presented by the Clayton-Bulwer Treaty. That object was meant and thought to be attained by the Hay-Pauncefote Treaty of 1901. It clearly permits the United States to build the canal. Does it also debar Great Britain from any control of the canal except such as results from the express provision that the canal shall be open for use to Great Britain and all other nations on terms of entire equality? The answer is to be found in the terms of the treaty itself interpreted according to their true intent. They can be so interpreted only by

reverting to the previous relations of the parties to the canal enterprise, to the new relations to the enterprise the parties meant to assume, and to the objects each had in view in making the treaty.

1. The Hay-Pauncefote Treaty of 18 November, 1901, it is to be noted, does not merely authorize the United States to build the canal through the territory of some other Power, though such would have been a possible construction of the rejected Hay-Pauncefote Treaty of 5 February, 1900. But the treaty of 18 November, 1901 adds a clause not found in the February treaty to the effect that no change of territorial sovereignty of the country or countries traversed by the canal shall affect the obligations of the parties to the treaty—thus assenting in advance to the acquisition by the United States of the territory needed for the canal. Hence, since the United States did afterwards acquire the canal zone, the terms of the November Hay-Pauncefote Treaty apply to the case of an artificial water-way constructed by a state on its own territory.

2. It is to be further noted that, by way of asserting the exclusive control of the canal by the United States and eliminating any semblance of control by other Powers, the November Hay-Pauncefote Treaty omits Article III of the February treaty by which other Powers were to have notice of the treaty and be invited to adhere to it.

3. The facts being, then, that the United States has rightfully built the canal through territory of its own; that, besides having become the owner of the canal route, the treaty expressly accords to the United States all the rights incident to construction; and that, in undertaking the canal as an United States enterprise, the United States did so with the manifest purpose of excluding all foreign control beyond that resulting from the stipulation for equality of terms to all users of the canal—what is there in the language of the treaty to justify the claim that the United States has made a further submission to foreign control by a stipulation which prevents it from allowing the use of the canal by its own vessels or those of its nationals on any terms it chooses to fix?

4. The one provision possible to be relied upon for that purpose is Rule 1 of Article III, declaring that "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules on terms of entire equality . . ."—and the single point is, are the words "all nations" inclusive or exclusive of the United States?

It seems difficult to successfully contend that the United States is included.

(a) The treaty is a contract by which the proprietor of a canal fixes the terms upon which it grants the use of the canal to its customers.

(b) It was needed for that purpose only; it was not needed to fix the terms upon which the United States and its nationals—its *cestui que trust*—should use the canal, because its use without tolls or otherwise as the United States might choose, is a necessary incident of its ownership of the canal.

It cannot reasonably be argued that, in fixing terms for the use of its canal by customers, the United States looked upon itself as one of the customers.

(c) The words under construction are in substance the first of a set of six rules adopted by the United States as the basis of the neutralization of the canal.

But the other five certainly apply only to parties other than the United States, so that there is the strongest reason for holding that the first of them is to be given a like application.

(d) And, if the British construction be correct, instead of liberating the United States from all foreign control of the canal and from all duties to foreign Powers in respect of its use—except not to discriminate between them—the Hay-Pauncefote Treaty compels the United States to reverse its established policy and to devise a plan for subsidizing its own vessels in order that they may have such free or other use of the canal as the United States may decide to be demanded by United States interests.

(e) The claim sometimes made that, by building and owning the canal the United States engages in a public calling and thereby undertakes to serve all comers without discrimination and at a reasonable rate, would seem to have no application to the present case. The principle affects only the users of the public work and only prescribes entire equality as between them—it in no way prevents the owner of the work, or those for whom it holds the work in trust, from using it in any way and to any extent that the legal or beneficial owner or owners may determine.

Besides, so far as international law on the subject can be regarded as settled, the rule is that “While a natural thoroughfare, although wholly within the dominion of a government, may be passed by com-



mercial ships, of right, yet the nation which constructs an artificial channel may annex such conditions to its use as it pleases." III Moore, 268; *The Avon*, 18 Int. Rev. Record, 165.

(f) Great stress is laid upon the preamble of the treaty and its reference to the neutralization of the canal as defined in Article VIII of the Clayton-Bulwer Treaty, which, it is claimed, compels the United States to forget that it is the owner of the canal, and, as regards its own vessels, forces it to look upon itself as a canal customer bound to pay for its use the regular tolls. It is elaborately argued that neutralization of this sort is a policy to which the United States has been committed from the earliest times.

But the argument ignores necessary distinctions and fails to note that "neutralization" of a canal describes a policy applicable as between the canal owner and customers of the canal but in no way touches or restricts the canal owner's rights or the canal owner's policy as to the use of the canal by itself. The several phases of American opinion, official and otherwise, respecting the construction and control of the Isthmian Canal have already been pointed out. While merely in the position of a probable user of the canal, the United States always and consistently claimed that the terms and conditions of use should be the same for all comers but in no way denied or disputed the inherent rights of the canal owner. Those rights, as already shown, are expressly recognized by the Clayton-Bulwer Treaty, which allows the owner to fix terms at will for the use of the canal by states withholding the protection to the canal given by the United States and Great Britain, and even permits the owner to deny to such states the use of the canal altogether. Since accepting its inevitable role of the canal builder and owner, the United States has always and consistently stood on its rights as such and, beyond agreeing to the neutralization of the canal as between customers, has repudiated the idea of any control of the canal except its own.

How clearly such is the case is shown by the briefest examination of the neutralization provided for in Article VIII of the Clayton-Bulwer Treaty, the principle of which is not to be impaired by the Hay-Pauncefote Treaty. What sort of neutralization is it? First, the United States and Great Britain are to determine what are just and equitable charges for the use of the canal by their citizens or subjects; second, the canal shall be open on those same terms to citizens and

subjects of other states; but, third, the citizens and subjects of other states shall have the benefit of those terms only if such other states grant the same protection to the canal as the United States and Great Britain engage to afford. Now there is no element of this species of neutralization which the Hay-Pauncefote Treaty leaves unimpaired, since the United States alone fixes reasonable and equitable rules for the canal traffic; since the canal may be used by all nations on no other condition than that they observe those rules; and since (as shown by the elimination from this treaty of Article III of the unratified Hay-Pauncefote Treaty of February, 1900) adherence to the treaty by the other Powers is not to be invited. If, by construing Article VIII in connection with other articles of the Clayton-Bulwer Treaty, any controlling principle of neutralization is to be deduced, it is the simple requirement that the same terms shall be made to all customers of the canal, a requirement restricting the rights of the canal owner to just that extent and no more and not disabling it from treating its own shipping in any way it sees fit. The like result follows from the Constantinople Convention of 1888, which is declared to be the basis of the neutralization of the canal and of the rules laid down in Article III for its navigation. By that convention, identical rules are to apply to all vessels using the Suez Canal in time of war or time of peace without distinction of flags, but "The rights of Turkey as the territorial Power are reserved," together with the sovereign rights of the Sultan and the rights and immunities of the Khedive.

It has been contended that the Senate of the United States understood the Hay-Pauncefote Treaty to mean what Great Britain now claims it to mean, because of the Senate's failure to pass the Bard resolution in favor of American coastwise shipping. But the claim seems to be thoroughly disposed of by proof that the reason of the failure was the opinion of Senators that the resolution was superfluous—that nothing in the treaty prohibited the United States, as the builder and owner of the canal, from exempting its coastwise shipping from tolls. Senator Bard himself has since so stated in a letter which was publicly read in the House of Representatives. He is emphatically corroborated on that point by other Senators.

It is also contended that American vessels must pay tolls because otherwise the reasonable and equitable tolls provided for by the treaty cannot be ascertained. The contention assumes, of course, the very

thing at issue, namely, that in the contemplation of the treaty and by its true construction American vessels are bound to pay tolls. But no other answer seems to be required than that, for the purpose of computing reasonable tolls for the use of the canal, it is not necessary that American vessels should pay tolls, but only that the amount they would pay if they were not exempt should be calculated and used in the computation as if paid.

To sum up the conclusions resulting from the foregoing considerations, it is submitted that—

1. The United States, as builder and owner of an artificial waterway within its own territory, is entitled to dictate the conditions of its use unless, and only so far, as it has contracted the right away.

2. It has made no such contract except with Great Britain and by the Hay-Pauncefote Treaty and by the clauses of that treaty which stipulate for the use of the canal by "all nations" on equal terms and for reasonable and equitable tolls.

3. As the term "all nations" comprehends not only states but their nationals, the crucial question is, are the words "all nations" inclusive or exclusive of the United States and its nationals?

4. The principle is well settled that a state conveys away its rights of sovereignty or property only by terms which are clear and express and are not susceptible of any other reasonable construction. If the terms are vague and of doubtful import, the presumption is against the state's intention to part with or abridge its jurisdictional or property rights.

5. Hence, as the term "all nations" as used in the treaty may be taken to mean either all without exception or all except the United States, the latter meaning is to be accepted as the true one because the least restrictive of the normal rights and powers of the United States.

6. But it is unnecessary to rely upon presumption. The treaty assumes the United States to be the owner of a canal to be built by it on its own territory and must be taken to have had as its natural and legitimate aim the fixing of the terms upon which other nations might use it. Except as necessarily abridged by such terms, nothing in the treaty indicates any purpose to further abridge the rights of the United States as canal builder and owner.

7. In short, the treaty is an instrument by which the proprietor of a canal fixes and states the terms of use to its customers.

There is an utter absence of evidence that the United States regarded itself as one of its customers.

8. The neutralization proposed by the Clayton-Bulwer Treaty resembles that proposed by the Hay-Pauncefote Treaty only in the idea that the operating charges and rules for use of the canal shall be the same for all nations. It differs, of course, in the vital feature of conditioning such equality of terms upon protection being afforded to the canal.

9. When five out of six of the treaty rules for the use of the canal do not apply to the United States, it is a reasonable conclusion that the sixth also was not meant so to apply.

10. The different phases of American public and official sentiment respecting the canal are noteworthy and not to be overlooked in construing the Hay-Pauncefote Treaty.

While the United States was expecting to be merely one of the users of the canal, it strenuously insisted upon equality of rules and charges for the use of the canal and did not concern itself about the rights of the canal owner.

When the rôle of builder and owner of the canal was forced upon it, it as strenuously insisted upon complete ownership and complete control and complete elimination of all foreign participation or control.

Its purposes and views are completely defeated, if the Hay-Pauncefote Treaty is to be construed according to the British contention and the United States has lost the ordinary and normal right of the canal owner to be exempt from the tolls and charges it makes to customers.

On the grounds and in view of the considerations above stated, the United States may contend, and it is believed can rightfully contend, that the Hay-Pauncefote Treaty of November, 1901, does not as justly interpreted prevent the United States from exempting its coastwise shipping from the payment of tolls for the use of the Panama Canal. But to the English contention that the controversy should be referred to arbitration, there seems to be no sufficient answer. Both countries are firmly committed to arbitration as the best method for the settlement of international disputes. It may be safely assumed without argument that, if the matter in difference is not otherwise disposed of, it will be left to an arbitral tribunal. It does not follow that resort must be or should be had to The Hague or the Hague Permanent Court of Arbitration. Our existing arbitration treaty with Great Britain, Article I, expressly excepts from reference to that court dif-

ferences which "concern the interests of third parties," and in the case of the present difference over the meaning of the Hay-Pauncefote Treaty, the "third parties" with interests concerned but without legal standing in respect of them include almost all the countries of Europe. That the present difference should not go to the Hague Permanent Court is as clear as that the parties are not bound to send it there. International arbitration derives its chief value from confidence in the arbitral tribunal and in its ability and purpose to do justice—an award lacking that confidence is not only likely to work unfortunately as regards the particular case but also to discredit the cause of arbitration generally—and the fact must be reckoned with that in this country there is a widespread conviction which has been publicly voiced in high official circles that all Europe is interested in the success of the British contention, and that submission of the controversy to arbitration under the Hague Convention would be in the nature of a farce. American sentiment on this point is no doubt in part due to the nature of the subject-matter in controversy. The claim of Great Britain is, in effect, a territorial claim. The United States possesses no more costly and perhaps no more valuable piece of territory than the Panama Canal, and Great Britain's claim is that the Hay-Pauncefote Treaty not only encumbers that territory with equal rights of use by all other nations, but impresses upon it a servitude by which the United States loses the free use of its own canal for its own vessels. It is rights of that nature as to which both countries are especially sensitive and which both countries have been peculiarly careful to safeguard. Thus, for territorial claims the general arbitration treaty of 1897 (perfected as such on the part of Great Britain but killed in the United States Senate) provided a tribunal of six arbitrators, three of whom should be chosen by each party, and whose award should be final only when made by not less than five arbitrators. The same general idea governed in the case of the Alaska Boundary, though the final award might be by four out of the six. A more important difference, however, is that in the case of the Alaska Boundary the arbitrators were to consist of "impartial jurists of repute," whereas by the 1897 treaty, they were to be taken from the judges of the highest courts of the respective countries. That such a tribunal should be made the interpreter of the Hay-Pauncefote Treaty, if arbitration of its terms becomes necessary, and would be greatly preferable to a tribunal constituted as in the Alaska Boundary controversy, is unques-

tionable. It would be superior in dignity, in impartiality, and in general competency. It would be infinitely more likely to be regarded as beyond the reach of any but the most correct motives and influences, and the results would be infinitely more likely to command the cheerful acquiescence of both countries.

The CHAIRMAN. The subject of the next address on the program is in the form of a question, "Does the expression 'all nations' in Article 3 of the Hay-Pauncefote Treaty, include the United States?" Rear Admiral Charles H. Stockton, President of George Washington University, will address the Society on that subject.

Rear Admiral STOCKTON. Mr. Chairman, Ladies and Gentlemen: Before I commence the formal reading of the paper, I would like to say a few words as a preface to what I consider the state of the controversy concerning the Panama Canal tolls.

I look upon this matter, at the present stage, not as a foreign question, not as a question between the United States and Great Britain, but primarily as a domestic question. The late Congress passed an Act containing a discrimination in favor of a certain kind of shipping of the United States in regard to the canal. That Act was signed by the President of the United States, and is now the law of the land. A new Congress, however, has been summoned; a new administration is in power. In both Houses of Congress propositions have been made for the repeal of that part of the law discriminating in favor of coastwise shipping. The opinion of the President of the United States is not known, or at least it has not been declared. The proposition for reconsideration is before the Houses and before the nation. Discussion is therefore in order. The view I take is that there are certain people of the United States and certain people in both Houses of Congress who wish to repeal this Act, so far as it makes a discrimination in favor of American shipping. That discussion is a legitimate one in every city and village in the United States, from its capital city down to the smallest hamlet in the country. Every American citizen has a right to enter into this discussion until the matter has been finally settled. Those who are in favor of the repeal are not affected by the view that it is one of antagonism to one of the largest countries, but are only solicitous, and rightly and properly so, of the dignity and the honor of the United States. This aspect is the one

that appeals to me and that appeals naturally to any intelligent citizen of the United States. The question of the retaliation of five or ten per cent, or any retaliation that may come from another country, is a matter that can be safely ignored by the United States because of its commercial and physical position, but any question of honor and fair dealing is a matter of the utmost solicitude.

DOES THE EXPRESSION "ALL NATIONS" IN ARTICLE 3  
OF THE HAY-PAUNCEFOTE TREATY INCLUDE THE  
UNITED STATES?

ADDRESS OF REAR ADMIRAL CHARLES H. STOCKTON, *President of  
George Washington University.*

In order to justify my contention for the affirmative, I will read the principal documents concerning the history of the interoceanic canal question which are more or less pertinent to the above question. I feel justified by what I consider the continuous thread found in this history that the United States entered in all and every phase of the question as a nation joined with one or more others in regard to the privileges, benefits and obligations in connection with the use of the interoceanic canal when constructed.

I furthermore maintain that whatever refuge may be found in municipal law in the way of technicalities, more popularly known as quibbles and evasions, is foreign to international law, which above all in its treaties represents an agreement in which honor and fidelity to obligation stand foremost. Not only the letter, but the spirit, governs.

Mr. Clay, at the time Secretary of State of the United States, wrote to Messrs. Anderson and Sergeant, United States representatives to the Panama Congress, May 8, 1826, that

A cut or canal for purposes of navigation somewhere through the isthmus that connects the two Americas, to unite the Pacific and Atlantic Oceans, will form a proper subject of consideration at the Congress. That vast object, if it should be ever accomplished, will be interesting, in a greater or less degree, to all parts of the world. But to this continent will probably accrue the largest amount of benefit from its execution; and to Colombia, Mexico, the Central Republic, Peru, and the United States, more than to any other of the American nations. What is to redound

to the advantage of all America should be effected by common means and united exertions, and should not be left to the separate and unassisted efforts of any one power. \* \* \* If the work should ever be executed so as to admit of the passage of sea vessels from ocean to ocean, *the benefits of it ought not to be exclusively appropriated to any one nation*, but should be extended to all parts of the globe upon the payment of a *just compensation or reasonable tolls*.

Following is a resolution of the Senate of the United States, adopted March 3, 1835:

Resolved, That the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting, by suitable treaty stipulations with them, such individuals or companies as may undertake to open a communication between the Atlantic and Pacific Oceans, by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever, *by such stipulations the free and equal right of navigating such canal to all such nations*, on the payment of such reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work.

HOUSE RESOLUTION OF 1839. In 1839 the canal question was taken up in the House of Representatives, on a memorial of merchants of New York and Philadelphia, on which an elaborate report was made by Mr. Mercer, from the Committee on Roads and Canals. The report in conclusion proposed a resolution that the President should be requested "to consider the expediency of opening or continuing negotiations with the governments of other nations, and particularly with those the territorial jurisdiction of which comprehends the Isthmus of Panama, and to which the United States have accredited ministers or agents, for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific Oceans, by the construction of a ship canal across the isthmus, *and of securing forever*, by suitable treaty stipulations, *the free and equal right of navigating such canal to all nations.*" This resolution was unanimously agreed to by the House.



Mr. Cass, Secretary of State, wrote to Mr. Lamar, Minister to Central America, on July 25, 1858:

The progress of events has rendered the interoceanic routes across the narrow portions of Central America vastly important to the commercial world, and especially to the United States, whose possessions extending along the Atlantic and Pacific coasts demand the speediest and easiest modes of communication. While the just rights of sovereignty of the states occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances that have arisen. *Sovereignty has its duties as well as its rights*, and none of these local governments, even if administered with more regard to the just demands of other nations than they have been, would be permitted, in a spirit of Eastern isolation, to close these gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel BELONG TO THEM, and that they choose to shut them, or, what is almost equivalent, to ENCUMBER them with such unjust regulations as would prevent their general use.

Article 35, treaty between the United States and New Granada:

The United States of America and the Republic of New Granada, desiring to make as durable as possible the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do agree to the following points:

1st. For the better understanding of the preceding articles, it is and has been stipulated between the high contracting parties, that the citizens, vessels and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated Isthmus of Panama, from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities concerning commerce and navigation, which are now or may hereafter be *enjoyed by Granadian citizens, their vessels and merchandise*; and that this equality of favors shall be made to extend to the passengers, correspondence and merchandise of the United States, in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the Government and citizens of the

United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise thus passing over any road or *canal* that may be made by the Government of New Granada, or by the authority of the same, than is, under like circumstances, *levied upon and collected from the Granadian* citizens; that any lawful produce, manufactures or merchandise, belonging to citizens of the United States, thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever; or, having paid such duties, they shall be entitled to drawback upon their exportation; nor shall the citizens of the United States be *liable to any duties, tolls or charges* of any kind, to which *native* citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, *the perfect neutrality* of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, *the rights of sovereignty and property which New Granada has and possesses* over the said territory.

President Polk, in his annual message to the Senate, says, in regard to this treaty, as follows:

4. In entering into the mutual guarantees proposed by the 35th article of the treaty, neither the Government of New Granada nor that of the United States has any narrow or exclusive views. The ultimate object, as presented by the Senate of the United States in their resolution (of March 3, 1835) [to which I have already referred], *is to secure to all nations the free and equal right of passage over the Isthmus*. If the United States, as the chief of the American nations, should first become a party to this guarantee, it can not be doubted, indeed it is confidently expected by the Government of New Granada, that similar guarantees will be given to that Republic by Great Britain and France. Should the proposition thus tendered be rejected, we may deprive the United States of the just influence which its acceptance might secure to them, and confer the glory and benefits of being the first among the nations in concluding such an ar-

rangement upon the Government either of Great Britain or France. That either of these Governments would embrace the offer can not be doubted; because there does not appear to be any other effectual means of securing to *all* nations the advantages of this important passage but the guarantee of great commercial powers that the Isthmus shall be neutral territory. The interests of the world at stake are so important that the security of this passage between the two oceans cannot be suffered to depend upon the wars and revolutions which may arise among different nations.

#### CLAYTON-BULWER TREATY.

April 19, 1850, Mr. John M. Clayton, Secretary of State, and Sir Henry Lytton Bulwer, British Minister at Washington, signed at that capital a treaty, the object of which was in the preamble declared to be to set forth and fix in a convention the "views and intentions" of the contracting parties "with reference to any means of communication by ship canal which may be constructed between the Atlantic and Pacific Oceans by way of the river San Juan de Nicaragua, and either or both of the lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean."

By Article I of the treaty it was provided as follows:

The Governments of the United States and Great Britain hereby declare that neither *the one nor the other* will ever obtain or maintain for itself any exclusive control over the said ship canal; agreeing that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have to or with any State or people for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection, or influence that either may possess, with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other.

The contracting parties further engaged (Article V) when the interoceanic canal was completed, to "protect it from interruption, seizure, or unjust confiscation," and to "guarantee the neutrality thereof, so that the said canal may forever be open and free, and the capital invested therein secure." It was, however, expressly understood that the guarantee of protection and security was given conditionally and might be withdrawn by both governments or either government, if both or either of them should consider that the persons or company undertaking or managing the canal had established regulations concerning traffic contrary to the *spirit and intention* of the convention, either by making *unfair discriminations* or by imposing oppressive exactions or unreasonable tolls.

By Article VI of the treaty the contracting parties entered into the following engagements:

The contracting parties in this convention engage to invite every State with which both or either have friendly intercourse to enter into stipulations with them similar to those *which they have entered into with each other*, to the end that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the canal herein contemplated. And the contracting parties likewise agree that each shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind, *on equal terms to all*, and of protecting the same; and they also agree that the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such treaty stipulations; and should any *differences* arise as to right or property over the territory through which the said canal shall pass, *between the States or Governments of Central America, and such differences should in any way impede or obstruct the execution of the said canal, the Governments of the United States and Great Britain will use their good offices to settle such differences* in the manner best suited to promote the interests of the said canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

\* \* \* \* \*

ARTICLE VIII. The Governments of the United States and Great Britain having not only desired, in entering into this con-

vention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or *Panama*. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the *same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.*

The Clayton-Bulwer Treaty has been superseded by the Hay-Pauncefote Treaty, but it will be found in the preamble of the latter that the motive and the only motive given for this supersession was to remove any objection which may arise out of the convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that convention, and hence the equal treatment of vessels of all nations as established by Article VIII of the Clayton-Bulwer Treaty still remains. As to the Suez Canal Treaty of 1888, which is adopted by the United States as the basis of the rules of neutralization, it must be remembered that the Suez Canal Treaty states in Article XII, that:

The high contracting parties in application of the principle of *equality* concerning the full use of the canal, a principle which forms one of the bases of the present treaty, agree, etc., etc.

Certainly no exception is made in favor of vessels of Turkey or Egypt, the owners of the territory through which the Suez Canal passes. Hence the term "all nations" means "all nations" in both treaties.

The simple, natural and honest meaning of the words "all nations" means every nation without exception. It has been well said that if

an exception had been contemplated, the words "all nations" could not have been used, and if all foreign nations only were contemplated the words "all foreign nations" would naturally have been made use of.

As to the question of the effect of the change of territorial sovereignty with respect to the term "all nations," let me read Article IV of the Hay-Pauncefote Treaty:

It is agreed that no change of *territorial sovereignty* or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of *neutralization* or the *obligation* of the High Contracting Parties under the present Treaty.

The Republic of Panama was recognized by the United States November 13, 1903. On November 18, 1903, a treaty, commonly known as the Hay-Bunau Varilla Treaty, was concluded between the United States and Panama, which after ratification, was proclaimed on February 26, 1904. Article XVIII of this treaty states that "the Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1, of Article III of, and in conformity with *ALL the stipulations of*, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901," which, of course, was the treaty commonly known as the Hay-Pauncefote Treaty, one of the stipulations of which in Article III, I will again repeat:

"The canal shall be free and open to the vessels of commerce and of war of *all nations* observing these Rules, on terms of entire equality, so that there shall be no discrimination *against any such nation, or its citizens or subjects*, in respect of the conditions or *charges* of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Let me close by asking—

Shall we sell our birthright in the family of nations for a mess of pottage? Shall we lose ourselves and our standing among other civilized countries of the world by violating our obligations as commonly understood at the time of the treaty in order to secure a veiled subsidy for our coastal trade?

I believe that our best jurists consider that we have violated and are violating two treaties at the present time:

(1) The treaty of 1846 with Colombia; and

(2) The Fur Seal Treaty with Great Britain, Russia and Japan.

Shall we add a third violation and with the "dirt" that flies at Panama add a flight of the principles of good faith and honorable dealing?

The CHAIRMAN. Now, gentlemen, we will have the pleasure of hearing from Mr. Lewis Nixon, of New York City, who will address us upon some questions of interest.

DOES THE EXPRESSION "ALL NATIONS" IN ARTICLE 3 OF THE HAY-PAUNCEFOTE TREATY INCLUDE THE UNITED STATES?

ADDRESS OF MR. LEWIS NIXON, *of New York, Delegate of the United States to the Fourth Pan American Conference.*

There seems to be an impression that the contention respecting the right of the United States to remit toll charges on its own vessels is an academic question, and that such contention is simply a battle of wits. As a fact, it is the most serious determination that has been asked of our people for half a century.

Our foreign trade is in the hands of our commercial rivals, and if the Panama Canal policy is not determined aright it will remain there with ever strengthening control. Surely no one will deny that a policy of preference for our own vessels inaugurated by Jefferson and Madison built up our marine and that it would do so again if revived.

Does any one think for an instant that Great Britain is protesting for form's sake and that she will not reap advantage by the destruction of such preference?

We have read only a short time ago what is tantamount to an abandonment of the Hay-Pauncefote Treaty in Great Britain's protest, which hies back to the superseded Clayton-Bulwer Treaty, and clings to it because in that sixty-two year old document we abandoned the Monroe Doctrine and made concessions not to be found in the later treaty.

Great Britain's claim, cleared from a mass of verbiage, is that the consideration for the abrogation of the Clayton-Bulwer Treaty was to secure equality of treatment for her vessels with those of the United States in ordinary commerce. While there is no such consideration expressed in the Hay-Pauncefote Treaty, nor in the cor-

respondence leading up to its ratification, nor by implication, some very remarkable and ingenious essays which are models of sophistry have been presented with a view to reading into the treaty an interpretation never intended.

The interpretation of treaties is founded on international law and not statute laws, and must be arrived at mainly through literal construction and definitions accepted as established in public law.

We had exact language employed in the Clayton-Bulwer Convention to secure equality of treatment, but we search in vain for any similar or analogous expressions in the Hay-Pauncefote Treaty. The first Hay-Pauncefote Treaty bound us hand and foot and fastened upon the United States every restriction of the Clayton-Bulwer Treaty. Happily this betrayal of the rights and interests of our country was rejected by a patriotic Senate.

Article VIII of the Clayton-Bulwer Convention says that the two governments agree to extend their protection by treaty stipulations to any other practical route. So the first Hay-Pauncefote Treaty proposed, while purporting to remove any objection to the building of the canal which may arise out of the Clayton-Bulwer Convention, was in reality an adroitly worded supplement to that convention. It extended by treaty the stipulated joint protection by which equal treatment was to be secured as outlined in the second paragraph of Article VIII. It did not supersede the Clayton-Bulwer Convention. It adopted rules forbidding discrimination under any condition either of peace or war, and made the building of the canal a partnership affair in which the United States bore all the burdens and, at the same time, through the limitations incurred under the rules of Article III, barred the United States from enjoying any of the rights incident to construction.

Of course, this first treaty is a very tender subject with those sympathizing with Great Britain, but the gradual shaping of the betrayal of our country's rights and interests as existing in the first treaty into the final treaty gives us a ready means of finding out the intent of the last treaty as ratified, and the pourparlers leading to the changes show plainly the acceptance by Great Britain of such changes, not blindly, but with perfect understanding of their purport.

There was a connecting link between the first and last treaty which throws much light upon our contention, and it is instructive to place the preambles and rules for securing the general principle of neutrality in parallel.



## FIRST TREATY.

(Rejected by Senate.)

*The High Contracting Parties*, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer Convention, *adopt*, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other Powers, signed at Constantinople October 29, 1888, for the free navigation of the Suez Maritime Canal, that is to say:

1. The canal shall be free and open, *in time of peace as in time of war*, to the vessels of commerce and of war of ALL NATIONS, on terms of entire equality, so that there shall be no discrimination against any NATION or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

The remaining rules refer to blockading and treatment of belligerents, except that Rule 7 says:

No fortifications shall be erected commanding the canal or the waters adjacent.

There is, however, a further article which says:

The High Contracting Parties will, immediately upon the exchange of ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it.

## SECOND TREATY.

(Suggested by Great Britain.)

*The United States adopts*, as the basis of the neutralization of said ship canal, the following rules, substantially as embodied in the convention of Constantinople, for the free navigation of the Suez Canal:

1. The canal shall be free and open to the vessels of commerce and war of ALL NATIONS, *which shall agree to observe these rules*, on terms of entire equality, so that there shall be no discrimination against any nation *so agreeing*, or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

The remaining rules refer to blockading and the treatment of belligerents, but Rule 7 prohibiting fortifications is omitted.

## FINAL TREATY.

(Ratified by Senate.)

The United States adopts, as the basis of neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, \* \* \* for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of ALL NATIONS *observing these rules*, on terms of entire equality, so that there shall be no discrimination against any such NATION, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

The remaining rules refer to blockading and the treatment of belligerents, but Rule 7 of the first treaty forbidding fortifications is omitted.

The second treaty given above was submitted by Lord Lansdowne as a proposed amendment of the first treaty. But note the efforts to retain a contract participation. The italicised phrases in the second treaty as suggested by the British Government are so worded as to preserve the partnership and to extend the contract participation of other nations by their *agreeing* to observe the rules, such agreement being secured by limiting the use of the canal to those *so agreeing*.

Lord Lansdowne, in his memorandum of August 3, 1901, suggests the second treaty as shown above, printing his proposed amendments in italics. He says:

I would suggest the insertion in Rule 1, after "*all nations*" of the words "*which shall agree to observe these rules,*"

and his suggested phrasing of this rule is given in his communication as follows:

The canal shall be free and open to the vessels of commerce and of war of all nations "*which shall agree to observe these rules,*" on terms of entire equality, so that there shall be no discrimination against any nation *so agreeing*, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.

I have already referred a number of times to this very clear exhibit of the meaning of "*all nations*" in the text of Rule 1 as ratified, but some, intentionally, and others without adequate study, have missed the significance of the Lansdowne connecting link, so I shall give a primer-like demonstration.

English diplomacy expected to secure a contract right in canal administration, in the first treaty, by Great Britain and the United States bringing such rules to the notice of the *other* Powers; in the Lord Lansdowne draft, since Great Britain no longer joined in the adoption of the rules, by printing after *all nations* the words *which shall agree to observe these rules*.

The claim that, after we had adopted the rules, *all nations which shall agree to observe them* includes the United States, would not hold against the logic of a child.

But follow down the draft suggested by Lord Lansdowne and we find that "there shall be no discrimination against any nation *so agree-*

*ing.*" This nation is certainly one of the "all nations" mentioned above as a natural consequence.

The United States adopts these rules. Under the Lansdowne draft other nations were to agree formally to observe the rules. With whom, pray, were they to agree—with one another? Of course not; they agreed separately with the United States as the party making the rules which they must *agree* to observe as a precedent to the use of the canal under the conditions covered by such rules. "All nations" of course includes the same Powers in all three exhibits and the Lansdowne draft clearly shows which they are.

So certainly "all nations" in the Lansdowne draft could not include the United States, and in consequence does not include the United States in the ratified treaty.

Mr. Hay is very clear upon this interpretation when he says that the amendment proposed by Lord Lansdowne would make Rule 1 more objectionable than would the third article of the first treaty which was stricken out by the Senate, for that only invited *other* Powers to come in and become parties to the contract *after* ratification, while the Lansdowne draft would compel *other* Powers to come in and become parties to the contract in the *first instance* as a condition precedent to the use of the canal by them.

Mr. Hay says:

An amendment to Lord Lansdowne's amendment was proposed and agreed upon, viz.:

To strike out from his amendment the words "*which shall agree to observe*" and substitute therefor the word "observing" and in the next line to strike out the words "so agreeing" and to insert before the word "nation" the word "such." This made the clause as finally agreed upon:

"The canal shall be free and open to the vessels of commerce and of war of all nations *observing* these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, etc."

Thus the whole idea of contract right in the *other powers* is eliminated, and the vessels of any nation which shall refuse or fail to observe the rules adopted and prescribed may be deprived of the use of the canal.

Can any one claim that the nations referred to are not the same in the Lansdowne and final drafts, since in one case they *agree to observe* and in the other they *observe*.

National self-respect requires a refutation that this was a cunning means to secure an unfair provision not fully understood by the British Government. I need only to quote from Lord Lansdowne's letter of October 23, 1901, to Lord Pauncefoot, in which he says:

Mr. Hay has suggested that in Article III, Rule 1, we should substitute for the words "the canal shall be free and open to the vessels of commerce and of war of all nations which shall agree to observe these rules," etc., the words "the canal shall be free and open to the vessels of commerce and of war of all nations observing these rules," and in the same clause, as a *consequential* amendment, to substitute for the words "any nation so agreeing" the words "any such nation." His Majesty's Government were prepared to accept this amendment, which seemed to us equally efficacious for the purpose which we had in view, namely, that of insuring that Great Britain should not be placed in a less advantageous position than *other* Powers, while they stopped short of conferring upon *other* nations a contractual right to the use of the canal.

Now, this statement of Lord Lansdowne refers directly to Rule 1 of Article III, which we are now discussing, and shows that he did not include the United States in "all nations" as there referred to, while every word of Mr. Hay disproves and refutes the libel upon his patriotism and statesmanship that he intended to give to all other nations the same rights in this canal that were to be enjoyed by the United States.

Senator Root has several times harkened back to Article VIII of the Clayton-Bulwer Convention for an argument to support his contention that we must treat the vessels of war and commerce of Great Britain upon terms of equality with our own vessels under all circumstances.

The entire Clayton-Bulwer Convention speaks of equal treatment owing to the fact that equal obligations were undertaken in affording protection and in guaranteeing neutrality.

By Articles II and V of the Clayton-Bulwer Convention the two governments provided jointly for the building of a *particular* canal, its protection and its neutrality, the latter being secured by joint protection. But in Article VIII we find two conditions covered separately in the two paragraphs of the article.

The first paragraph establishes as a general principle, to apply to

all available routes, the particular object accomplished by joint protection in earlier articles of the treaty, this object being the neutralization secured in Articles II and V by joint protection.

The second paragraph provides that if the two countries do extend their contract joint protection by treaty stipulation to other routes, such routes shall be open to the two countries on equal terms and on like terms to other countries willing to join in the protection.

An important fact in this connection is that either party could withdraw the protection by which neutrality and protection was secured by giving six months' notice, in case such equality of treatment was not secured.

Now, the first treaty did extend such joint protection by treaty stipulation and simply supplemented the Clayton-Bulwer Convention, but this adroit attempt to secure equal treatment was frustrated by a patriotic Senate.

As provided by the Clayton-Bulwer Convention, the canal specified to run through Nicaragua was to be neutralized by the two nations jointly; they were to join in the burdens; they were to join in the protection; and they were to join hand in hand in controlling the canal and in seeing that all nations did have exactly the same treatment by the company building this canal through a territory alien to each of them.

This partnership control you will see has been definitely and permanently ended by the last treaty, and this termination, we see from the pourparlers, proves beyond question that Great Britain understood this and acted in complete accord with such understanding.

Equality of treatment under Article VIII was the return for a joint assumption of burden and responsibility, yet the British contention is that since a certain privilege was obtained through joining in protection, this privilege must continue even though Great Britain is relieved from this expensive and burdensome responsibility. That is, in the absence of explicit yielding to Great Britain, our rights are to be limited or destroyed by implication. But happily the wording of the Hay-Pauncefote Treaty is clear upon this point. Is it "equal treatment" or "neutrality" that is carried over from Article VIII? The preamble to the articles of the treaty says: the objections that may arise from the Clayton-Bulwer Convention to the construction of the canal are to be removed "without impairing the *general principle of neutralization* established in Article VIII." We supersede the treaty in every other respect.

Rule 1 of Article III says that the United States adopts as the *basis of neutralization* certain rules substantially as embodied in the Suez Canal Treaty. And further light is thrown upon the meaning by the fact that in modifying the Suez rules only such parts as provided for *neutralization* were retained and all references to equal treatment thrown out.

But Great Britain, and some American supporters of her protest, say that, so long as she is not permitted to join in protection, that neutrality secured by *our* protection becomes the same as *equal treatment* secured by joint protection. It shows the demoralization of the public mind on this question when such preposterous conclusions are taken seriously. I should be the last one to decry British diplomatic capacity, nor do I find anything wrong in their diplomats making the best case possible for their government. They certainly act upon Madame de Staël's saying that: "The patriotism of nations ought to be selfish." It has long been a favorite expedient of British diplomatists to lay claims long in advance through *pour-parlers*. So the ingenious attempts up to the last minute to retain a partnership or contract participation in the Hay-Pauncefote Treaty were to be expected.

The Treaty of Ghent, which some of those not knowing of its provisions are anxious to celebrate, signed fifteen days before the battle of New Orleans, provided for the restoration of all territory, places and possessions taken by either nation from the other during the war, with certain unimportant exceptions.

But the minutes of the conference at Ghent kept by Albert Gallatin represent the English commissioners as declaring in exact words through Mr. Goulburn:

We do not admit Bonaparte's construction of the law of nations. We cannot accept it in relation to any subject-matter before us.

While the American commissioners did not appreciate the meaning, it became known afterwards that the British Ministry did not intend the Treaty of Ghent to apply to the Louisiana Purchase at all. From 1803 to 1815, Pitt, the Duke of Portland, Granville, Perceval, Lord Liverpool and Castlereagh, denied the right of Napoleon to sell the territory to us.

The words used by Mr. Goulburn were meant to lay the foundation for a claim on the Louisiana Purchase entirely external to the provisions of the Treaty of Ghent. And if Pakenham had not been defeated we should have been deprived of this territory and should have had no canal.

We had a similar prior filing by Sir Henry Bulwer of a statement that the British Government did not understand the engagements of the Clayton-Bulwer Convention to apply to British settlements at Honduras or its dependencies.

Fortunately, though, in the case of the Hay-Pauncefote Treaty the negotiations support all the American contentions as the letters exchanged clear up all points in dispute, and clearly restrict the sphere of operation of the rules to a field in which they affect all persons and vessels alike.

I have already referred to the different paragraphs of Article VIII, but Mr. Hay is so freely quoted in what he might say were he alive that I wish to advance the evidence of his written ideas at the time of the negotiations. In the memorandum prepared by him we find, in referring to Article IV of the Hay-Pauncefote Treaty:

It is thought to do entire justice to the reasonable demands of Great Britain in preserving the *general principle of neutralization* and at the same time to relieve the United States of the vague, indefinite, and embarrassing obligations imposed by the eighth article of the Clayton-Bulwer Convention.

And yet, while plainly done away with by Mr. Hay, who in good faith preserves the general principle of neutrality, we find Senator Root in his Senate speech endeavoring to revive these same vague, indefinite and embarrassing obligations of Article VIII.

Let us read Article III-A of the second treaty as suggested by Great Britain:

In view of the permanent character of this treaty, whereby the general principle established by Article VIII of the Clayton-Bulwer Convention is reaffirmed, the high contracting parties hereby declare and agree that *the rules* laid down in the last preceding article shall, so far as they may be applicable, *govern all interoceanic communications* across the isthmus which connects North and South America, and that no change of territorial

sovereignty, or other change of circumstances, shall affect such general principle or the obligations of the high contracting parties under this present treaty.

Did we accept this? Not at all. Consistent with the firm principle of refusing direct or indirect efforts to secure equal treatment with United States vessels or to invalidate Article II vesting in us the enjoyment of the rights incident to construction, it was changed to the following, appearing as Article IV in the Hay-Pauncefote Treaty:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

Lord Lansdowne explains his consent to this change by saying that Mr. Hay contended that the general principle of neutrality was already mentioned in the preamble and that to reiterate the idea in still stronger language and to give Article VIII of the Clayton-Bulwer Convention what seemed a wider application than it originally had would not meet with acceptance by the United States. Mr. Hay never intended that the rules for conserving neutrality should govern all interoceanic communication and naturally refused to permit any such idea to find lodgment in the treaty.

No one will question or deny that the rules of Article III are to be taken together. If the interpretation of one rule as forbidding preference for our own vessels of commerce and war renders the remaining rules absurd we have reasons as old as Euclid's teachings for setting such interpretation aside.

Rule 1 says that the canal shall be free and open to the vessels of *commerce* and *war* of all nations observing these rules upon terms of entire equality. Now they construe this to mean that we are prevented from preferring our own vessels of commerce.

But if it applies to vessels of *commerce* it must in exact terms apply to vessels of *war*.

In other words, under any unquibbled construction of this section we cannot exclude vessels of war and include vessels of commerce under our flag unless we are in a class apart, as of course we are.



Please read Sections 1, 2, 3, 4, 5 and 6, for they must be read together to clear up this question.

All, I believe, will admit that the constitutional authority to build this canal existed in the war power of the United States. Two Presidents have confirmed this view in their statements that this canal is an addition to our war power, as it admits of quicker transfer of our naval forces from one ocean to another.

Yet advocates of the British contention take the stand that we are forbidden to discriminate in favor of our own vessels of commerce, and as vessels of war and commerce are linked together, to be consistent they must argue that we cannot discriminate in favor of our own vessels of war.

Hence they must take the position that if during war with a foreign Power we find an enemy's man-of-war in the canal, we cannot drive it out, and if it leaves such waters we must wait twenty-four hours before giving chase. And since under Article II we are given the "exclusive right of providing for the regulation and management of the canal," if engaged in war our ships find themselves in the canal must chase themselves out. Can we reach any other logical sequence of their stand? Need its absurdity be pointed out?

The rules in their entirety are simply a means of defining the conditions under which we shall hold the canal neutral. There has been so much international misrepresentation that this fact has not been grasped except by those who have given this subject exhaustive study.

The usefulness of these rules in respect to neutral treatment and how they are apart from tolls and regulations connected with the commercial use of the canal is not usually understood on account of the insincerity of those who attempt to uphold the British contention by ignoring the object to be attained by the rules as well as the clear provisions of Article II of the treaty.

I heard an eminent authority make the statement a few days ago that if Mr. Hay were alive he would say that the toll exemption clause was in violation of the treaty. Unfortunately Mr. Hay is not here, but he is on record in correspondence connected with the negotiations of the treaty in which he says:

Upon due consideration of these suggestions, and at the same time to put all the Powers on the same footing, *vis.*, that they

could use the canal only by complying with the *rules of neutrality* adopted and prescribed, an amendment to Lord Lansdowne's amendment was proposed and agreed upon.

This amendment, according to Mr. Hay, secured the following:

Thus the whole idea of contract right in the *other* Powers is eliminated and the vessels of any nation which shall refuse or fail to observe the rules adopted and prescribed may be deprived of the use of the canal.

Here we find in Mr. Hay's own written words a full appreciation of the fact that these are rules of neutrality and that they are binding upon the vessels of *other* nations.

This, reduced to simple phrasing, is that we only ask other nations to obey our rules of neutrality and we pledge ourselves that even in war in which we are not engaged this strait shall be held free and neutral by us to even the war vessels of belligerents, they being required to continue on their good behavior when they pass from the high seas to waters under our control, management, protection and ownership.

Let us see whether the British Government considers these rules as being formulated for the commercial control of the canal. Lord Lansdowne, under date of August 3, 1901, wrote:

It would appear to follow that the whole responsibility for upholding these rules and thereby maintaining the *neutrality* of the canal would henceforward be assumed by the Government of the United States.

In the same communication he says:

While indifferent as to the form in which the point is met, I must emphatically renew the objections of his Majesty's Government to being bound by stringent rules of neutral conduct not equally binding upon *other* powers. I would therefore suggest the insertion in Rule 1 after "all nations" of the words "which shall agree to observe these rules." This addition will impose upon *other* powers the same self-denying ordinance as Great Britain is desired to accept, and will furnish an additional security for the neutrality of the canal, which it will be the duty of the United States to maintain.

We know this effort to obtain a contract right in canal management was defeated, but no one can logically contend that this does not show a clear appreciation and acceptance of the fact that these rules are for the purpose of defining our understanding of our neutral obligations.

Of course, as the final treaty is worded, we find in the words of Mr. Hay:

That no other power had now any right in the premises or anything to give up or part with as a consideration for acquiring such a contract right.

Certainly no one will say that "all nations" as used in the above quotation from Lord Lansdowne's communication includes the United States.

Following the use of the word "nations" and comparing Rule 1 of the second and final treaties given above, no open-minded man will deny the fullest British endorsement of the fact that "nations" as therein used refers to all other nations except the United States. The only conclusion is that, instead of asking all nations to agree to observe these rules as a precedent to the use of the canal by the vessels of such nations, we adopt the rules and require all nations to observe them, and, under circumstances so clearly evidenced by the *pour-parlers*, the United States could not be one of "all nations" therein referred to.

This is why well-informed English diplomats leave to American sympathizers the task of influencing the American public mind by the continued assertion that "all nations" includes the United States when it is only necessary to follow the evolution of the phrase through successive treaties to know that it does not.

Senator Root, in his various speeches, refers to the views of our past statesmen as indicative of our policy regarding a canal. When these were given everyone contemplated a canal through alien territory whose governments were weak. If we expected European countries to respect the sovereignty and neutrality of the land of such countries we should set an example ourselves. Conditions, as he very well knows, are entirely changed.

But I resent the general assumption that we could not have built a canal without Great Britain's permission. The Monroe Doctrine

already barred Great Britain from doing what she agreed not to do in the Clayton-Bulwer Treaty, and the first Hay-Pauncefote Treaty was considered, as was the Clayton-Bulwer Treaty, in violation of the Monroe Doctrine, and was denounced by the Democratic party in its Denver Platform.

So, while I will refrain from extensive and immaterial quotations from past statesmen, I must refer, in this instance, to an official report. The Committee of Foreign Relations of the Fifty-first Congress presented a report containing a review of the history of the Clayton-Bulwer Treaty, and it reported to the Senate its conclusion that it had become obsolete and that:

The United States is at present under no obligations, measured either by the terms of the convention, the principles of public law or good morals, to refrain from promoting, in any way it may deem best for its own interests, the construction of this canal without regard to anything contained in the convention of 1850.

To this report are appended the names of every member of the committee, among them two who have held the office of Secretary of State, Messrs. Evarts and Sherman.

There is an idea prevalent that the rules for neutrality are not applicable in their entirety to neutral obligations, and that Rule 1 is inconsistent unless applied to peaceful commerce. Let us examine them as briefly as possible.

The intention is to make sure that we shall not play favorites in time of war by extending any special privileges or treatment to one belligerent as against another, either by hindering or delaying his vessels of war or by interfering with his vessels of commerce. Hostile operations might be hampered, even by unjust or inequitable charges exacted in such a way that under particular circumstances such charges might bear more heavily on one belligerent than another. So we agree not to discriminate as between nations in respect of the conditions or charges of traffic or otherwise—not simply tolls, but any rules affecting passage through the canal in the interest of one belligerent as against another.

This is the condition of equality of treatment meted out to belligerents under the rules we have adopted to secure the neutralization of the canal. We can only be neutral as between others, we cannot be neutral in case we are ourselves a belligerent. While this was ad-

mitted by Lord Lansdowne, we find Sir Edward Grey, realizing that such prior admission was damaging to their case, endeavoring to extend us certain special rights for our men-of-war on the score that we now have sovereign rights in the Canal Zone. This is a dangerous concession, for if we are in a class apart with our men-of-war, we are, of course, in a class apart with our merchant vessels, and changes, in vital respects, brought about by changed relations of principals, render the entire treaty voidable.

Since Dr. Oppenheim states in his recent booklet that we have no such rights, a quotation from Sir Edward Grey's protest will be of interest. The protest says:

Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

Since successful contention that "all nations" includes the United States is manifestly impossible, the United States is of course in a class apart. While this was conceded February 22, 1901, by Lord Lansdowne, and by Sir Edward Grey in the late protest by the British Government, we find a labored argument in a recent booklet by Dr. L. Oppenheim, Professor of International Law at the University of Cambridge, which, taking as an axiom the fact that the United States is not in a class apart, proves to his satisfaction that we too are prevented from using the canal to our advantage in time of war. As his premise is wrong, his conclusion cannot hold, and in view of the fact that what he contends for is already conceded by the British Government, his inferences may be ignored. While wrong as to his premises, however, he is too well versed in international law to attempt to give a strained and impossible definition to "neutrality." He says:

There ought, however, to be no doubt that the United States is as much bound to obey the rules of Article III of the Hay-Pauncefote treaty as Great Britain or any other foreign state. These rules are intended to invest the canal with the character of neutrality. If the United States were not bound to obey them, the canal would lose its neutral character, and, in case she were a belligerent, her opponent would be justified in considering the canal a part of the region of war and could, therefore, make it the theatre of war.

Great Britain contended during the negotiations that, while other nations, if our enemy, were free to violate the neutrality of the canal in time of war in which we were engaged, she as a party to the treaty could not. Lord Lansdowne said, August 3, 1901:

I understand that by the omission of all reference to the matter of defence the United States Government desire to reserve the power of taking measures to protect the canal, at any time when the United States may be at war, from destruction or damage at the hands of enemy or enemies.

Mr. Hay clearly states his sense of our rights, and they are in accord with Lord Lansdowne's, when he states that the effect of the omission of the words "in time of peace as in time of war" is that this "would give to the United States the clear right to close the canal against another belligerent and to protect and defend itself by whatever means might be necessary." And that this omission dispensed with the necessity for the Davis amendment.

Not only has there been a desire to keep alive the abrogated Clayton-Bulwer Treaty, but since the Treaty of Constantinople was drawn upon in shaping the rules of neutrality, there is an attempt to read into rules adopted by us in Article III for securing neutrality, the various obligations of the Suez rules whether found in our rules or not. In revising the rules in order to adapt them to the intentions of the negotiators, every feature not applying to the neutrality which they engaged to offer was stricken out.

Thus from Article I was taken out: "The canal shall always be open in time of peace as in time of war regardless of flag." The rules do not guarantee at all times and for all Powers the free use of the canal, nor forbid the keeping of men-of-war in or near the canal, nor provide that the canal must remain open in time of war. In fact, the changes made from the Suez Canal rules clearly put the United States in a class apart in all such respects.

Since the rules as adopted are designed to embody the conditions under which we agree to uphold the neutrality of the canal, let us seek the definitions of neutrality as given in Dr. Oppenheim's work entitled *International Law*. He says:

Neutrality may be defined as the attitude of impartiality towards belligerents, adopted by *third* states and recognized by belligerents, such attitude creating rights and duties between the impartial states and the belligerents.

No one but ourselves is permitted to maintain the neutrality of the canal; we do not agree to be neutral toward an enemy, hence we hold the canal neutral as to other Powers. Again, quoting from Dr. Oppenheim:

Since neutrality is an attitude of impartiality, it excludes such assistance and succor to one of the belligerents as is detrimental to the other, and, further, such injuries to one as benefit to the other.

Reading Rule 1 of Article III, it covers such contingencies of impartial treatment in that we treat the vessels of commerce and of war of all nations alike, not simply as regards charges and conditions of traffic, but in all other ways in which we might aid or succor one or injure the other.

How closely we follow in our rules the Oppenheim doctrines is shown by again quoting him:

Neutrals must prevent belligerents from making use of their neutral territory and of their resources for military and naval purposes during the war.

A hurried résumé of the rules shows that vessels of war of a belligerent must not embark or disembark troops, munitions of war, or warlike materials, that the canal must never be blockaded, that vessels of war of a belligerent shall not remain within three miles of either end, and that a vessel of war of a belligerent shall not depart within 24 hours from the departure of a vessel of war.

In fact, it will be found that every contingency connected with belligerent operations is covered by our rules, but that, having adopted such rules to preserve the neutrality of the canal, they are not capable of being construed nor stretched to cover conditions having to do with ordinary commerce unaffected by belligerent operations.

We have the support of Dr. Oppenheim in this; following him further in defining and explaining neutrality, we find:

Neutrality is a condition during a condition of war only.  
Rights and duties deriving from neutrality do not exist before the outbreak of war.

Hence in applying rules to conserve the neutrality of the canal, such rules, if directly applying to accepted understanding of neutral obligations, could not be extended to cover the ordinary conditions and far more extended existence of peaceful commerce, except by specific provisions or by implication from the fact that no articles in the treaty granted further powers.

Now, Lord Lansdowne did attempt to make these rules apply to ordinary commerce when he suggested August 3, 1901, an amendment that the neutrality rules should "govern all interoceanic communications across the isthmus." This was stricken out as explained elsewhere. But we have in force an article covering all communications not affected by the obligations and duties of neutrality. Let us read this strong, virile and unambiguous Article II, which says:

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

We agree in Article III not to use the canal to advance the fortunes of any particular belligerent by a frank and open adoption of rules of neutrality to be applied by us to the nations of the world as the conditions under which they may use the canal. If a belligerent should betray the faith we put in him by injuring the canal for hostile advantage we could debar such nation from further use of the canal after belligerent operations, or penalize such nation in our discretion.

But outside of such obligations of neutrality, we have in Article II full freedom of action. While under our favored-nation treaties we shall probably accord in general equal tolls to the vessels of other nations, there is nothing to prevent our making reciprocal concessions with other nations. I, of course, assumed that Senator Root justified on this score his negotiation of the tripartite treaty between Panama, Colombia and the United States, extending reciprocal concessions not accorded to all other nations. In similar manner the Hay-Bunau Varilla treaty extended special privileges to Panama.

In fact, the treaty of 1846 with Colombia stood in the way of even



the equal treatment covered by the superseded Clayton-Bulwer treaty, as it extended certain privileges in Colombia to the United States by virtue of our giving reciprocal conditions of treatment in Colombia itself. It is an accepted principle in international law that favored-nation treaties do not preclude the extending of a special privilege to another nation provided a reciprocal privilege is secured in return. Thus the United States negotiated a commercial treaty with the Sandwich Islands in 1876, providing for certain reciprocal trade concessions.

The British Government made the following comment thereon:

As the advantages conceded to the United States by the Sandwich Islands are expressly stated to be given in consideration of and as an equivalent for certain reciprocal concessions on the part of the United States, Great Britain cannot, as a matter of right, claim the same advantages for her trade under the strict letter of the treaty of 1851.

We have the exclusive right to administer the canal and to regulate commerce through it in such a way as to possess and enjoy the rights incident to construction. If such rights meant that we should have no rights not participated in by all other nations, why are the exclusive rights vested in us? Certainly the most important right that comes to our mind is the particular right of sailing it with our ships.

Evidently Senator Root's conclusions are that the Monroe Doctrine was in no sense binding upon Great Britain, and that her seizure of lands, in direct opposition to that doctrine, gave her a "coign of vantage which she herself had for the benefit of her great North American Empire for the control of the canal across the isthmus."

England promised nothing in the Clayton-Bulwer Treaty that she was not barred from holding by the Monroe Doctrine, and she gave up nothing, even after promising, and the coign of advantage thus embraced is to give rise to a claim over Panama, according to Senator Root, for when asked whether the treaty of 1846 did not influence the possible extension of the Clayton-Bulwer Convention to Panama he took a position which seems contrary to the provisions and precedents of public law and in direct repudiation of the clearly expressed attitude of successive administrations of the United States in his reply, in which he said that:

The whole isthmus was impressed by the same obligations which were impressed upon the Nicaragua route, and whatever rights we had under our treaty of 1846 with New Granada we were thenceforth bound to exercise with due regard and subordination to the provisions of the Clayton-Bulwer Treaty.

Every precedent and practice of international law seems in conflict with such a stand.

Dr. Oppenheim says:

Such obligation as is inconsistent with obligations from treaties previously concluded by one State with another cannot be the object of a treaty with a third State.

In case the arbitration so vigorously urged by Senator Root should find for Great Britain, should we refuse to accept such finding in order to keep our faith under the Panama Treaty or abrogate the Panama Treaty in order to submit to the finding?

And in direct opposition to his present doctrine we know that Senator Root negotiated the tripartite treaty between Panama, Colombia and the United States, extending certain special reciprocal rights to these nations.

I must protest against further use of the defeat of the Bard resolution to show the intention of the Senate when it discussed the treaty, since Senator Bard himself and senators of all political parties unite in saying that the resolution was regarded as superfluous, as they considered there was nothing in the treaty forbidding discrimination in favor of our own vessels.

While the evolution of the Hay-Pauncefote Treaty proves conclusively that "all nations" does not include the United States, and that hence the United States is in a class apart, it would not be possible to apply any other interpretation even if the treaty stood alone.

While Senator Root is quick to advance and reiterate the action of the Senate on the Bard resolution, we do not find him explaining why our Senate struck out the provision from Article III-A of the Lansdowne treaty, which said that the rules of Article III should "govern all interoceanic communication across the isthmus," thus confining such rules to the conservation of neutrality but not hampering the United States in belligerent operations.

Article IX of the Treaty of Vienna, which provides for the neutral-

ity of the free town of Cracow, says that "no armed force shall be introduced upon any pretense whatever."

In the Treaty of Paris, neutralizing the Black Sea, maintenance of armaments was prohibited. In neutralizing Luxemburg there was a provision that the City of Luxemburg should no longer be treated as a federal fortress. Article III of the Treaty of London, November 14, 1863, neutralizing the Ionian Islands, said: "The fortifications constructed in the Island of Corfu, having no longer any object, shall be demolished." The Berlin Treaty of 1878, referring to the neutralization of the Danube, said: "All the fortresses and fortifications existing on the course of the river shall be razed and no new ones erected."

Yet, in neutralizing the Panama Canal, the prohibition against fortifications is omitted by mutual consent.

Senator Root in his Senate speech says:

When the United States turned its attention toward joining these two coasts by a canal through the isthmus it found Great Britain in possession of the eastern end of the route which men generally believed would be the most available route for the canal. Accordingly, the United States sought a treaty with Great Britain by which Great Britain should renounce the advantage which she had and admit the United States to equal participation with her in the control and the protection of a canal across the isthmus.

If this is to validate Great Britain's occupation of the Mosquito coast it seems unwarranted.

The conversion of English lumber camps on the eastern coast of Honduras and Nicaragua into what was practically British territory, through virtue of occupation in anticipation of the building of the Panama Canal, was considered by American statesmen of the period as a virtual abandonment of the Monroe Doctrine, as it was.

In 1848 England seized and occupied Greytown until 1860 under the mask of aiding the Mosquito Indians, even crowning an Indian king as a "cousin" and "great and good friend" of European sovereigns. The salary of the king was £1,000 a year until 1864, when he died.

Just so long as England deemed it necessary, she kept up her protectorate over the Mosquito reservation, getting the Austrian Emperor to bolster up her claims in 1880, and it was not till 1894 that the

Mosquito coast was turned over to Nicaragua, and this never occurred till work under Menocal on the Nicaragua Canal, which was carried on in 1891 and 1892, was abandoned.

Shortly before the Clayton-Bulwer Treaty was negotiated, England, to clinch her hold on the canal, seized Tiger Island commanding the Pacific terminus.

Mr. Squier, who was sent by our government to Nicaragua, concluded a treaty with that government, ceding this island to the United States.

Had we taken possession it would have meant war with Great Britain. We were in the midst of the discussions of the differences leading up to our Civil War, and had we gone to war with Great Britain at that time, the Civil War might have been precipitated, with the Southern States as possible allies of Great Britain.

So our government was driven to execute a treaty which violated the intent of the Monroe Doctrine. Just as one of the results of the Russo-Turkish War was to give England control of Cyprus, so it was wished to occupy territory near the canal in British interests, and while in the treaty agreeing not to fortify or occupy any part of Central America we find her holding fast to the Mosquito coast till 1894, although in Article I of the Clayton-Bulwer Treaty she agreed not to, and to Belize up to the present day. While Senator Root freely quotes what Great Britain engaged by treaty to do, he does not state that she violated this treaty in letter and spirit. President Pierce, in a message in 1856, said:

It is with surprise and regret that the United States learned that a military expedition under the authority of the British Government had landed at San Juan del Norte, in the State of Nicaragua, and taken forcible possession of that port, *the necessary terminus* of any canal across the isthmus within the territories of Nicaragua. It did not diminish to us the unwelcome-ness of this act on the part of Great Britain to find that she assumed to justify it on the ground of an alleged protectorship of a small and obscure band of uncivilized Indians whose proper name had even been lost to history, who did not constitute a state capable of territorial sovereignty either in fact or in right, and all political interests in whom and in the territory they occupied Great Britain had previously renounced by successive treaties with Spain when Spain was sovereign to the country and subsequently with independent Spanish America.

Yet, with the facts of history well known to him, we find Senator Root making the remarkable statement that:

Under these provisions the United States gave up nothing that it then had. Its obligations were entirely looking to the future; and Great Britain \* \* \* gave up its rights to what was supposed to be the eastern terminus of the canal. \* \* \* Under this treaty \* \* \* Great Britain did surrender her rights to the Mosquito coast, so that the position of the United States and Great Britain became a position of absolute equality.

Does Senator Root believe that his great prestige with the American people will not be hurt if he does not qualify the above statement by saying that Great Britain did not loosen her hold on this terminus till nearly half a century after the treaty, and that she still holds Belize? Does he take the position that the Monroe Doctrine did not bar such occupation as England agrees in the treaty not to enforce, but continued till 1894? *This* ingenious building of a foundation for equality over the Panama route is demolished by the existence of the Colombian Treaty of 1846.

Does he assume that the Monroe Doctrine, which was abandoned in the Clayton-Bulwer Convention, and later in the first Hay-Pauncefote Treaty, is nothing?

Does he think the adroit attempts to obtain a contract right in the special privileges accorded to us in 1846 by Colombia were nothing—a danger so great that President Arthur in his annual message of December 6, 1881, recommended that we should abrogate the conflicting clauses? A danger, too, apprehended in 1857 when Mr. Cass said to Lord Napier that no new guarantee joined in by England was desirable.

Secretary of State Olney, in 1896, said:

In short, the true operation and effect of the Clayton-Bulwer Treaty is that, \* \* \* as respects all water and land inter-oceanic communications across the isthmus, the United States has expressly bound itself to so far waive the Monroe Doctrine as to admit Great Britain to a joint protectorate.

Naturally the fact that Article VIII provided that the two contracting parties engaged to invite other nations to enter into similar stipulations permitted participation in such protectorate in favor of all nations of the world.

Why did not Senator Root in his contention respecting coasting trade, in citing long-ago intentions of the United States, quote the clearly expressed attitude of this country as enunciated in the message of President Hayes when Mr. Evarts was Secretary of State:

The policy of this country is a canal under American control. The United States cannot consent to the surrender of this control to any European Power or to any combination of European Powers. The canal would be the great ocean thoroughfare between our Atlantic and Pacific coasts, and virtually *a part of the coast line* of the United States.

I have looked in vain for any renunciation of this stand. To argue that Great Britain, through our agreeing to neutralize a canal, still has an overlordship of territory under our sovereignty, putting our territory under the servitude of a foreign Power, is to destroy our sovereign rights on the isthmus. Senator Root flouts this sovereignty in his Senate speech of January 21, 1913, saying of the Canal Zone:

It is not our territory except in trust.

The Hay-Bunau Varilla Treaty does not bear out this statement. Article III of that treaty between Panama and the United States says:

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned \* \* \* which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

And under Article XIV covering the payment of the fixed sum of \$10,000,000.00 and an annual payment after nine years of \$250,000.00, we find:

But no delay or difference of opinion under this article or any other provisions of this treaty shall affect or interrupt the full operation and effect of this convention in all other respects.

As regards the grant of land in the Zone, Justice Brewer decided that such a grant necessarily carried the fee title, as it entirely excluded the rights, present or reversionary, of any other proprietor. If the United States has all the rights, power and authority within the Zone, which its sovereignty of the Zone could possess, and is to exercise these powers in perpetuity to the entire exclusion of the enjoyment by the Republic of Panama of any such rights, power or authority, it is manifest that there is but one sovereign over the Zone and that it is the United States.

Jefferson, in doubt as to the constitutional right to take over the Louisiana Purchase, was given an opinion by Chief Justice Marshall as follows:

The Constitution confers absolutely upon the Government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

And if we wish British endorsement we find in the protest of Sir Edward Grey:

Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

And let us not forget that in Article I of the Hay-Bunau Varilla Treaty the "United States guarantees and will maintain the independence of the Republic of Panama."

Senator Root also says in his Senate speech that Article VIII providing for conditions covered by certain treaty stipulations (*never entered into*) so influences the Hay-Pauncefote Treaty as to secure through it the reciprocal equal treatment provided on Canadian and United States lakes and rivers in the Treaty of Washington. He says that when Canada attempted to evade these clear provisions we forced the Dominion to live up to them.

Of course we did, and if he can show me provisions for similar treatment or any wording in the Hay-Pauncefote Treaty based upon the clearly expressed provisions of the Canadian treaties, every one will agree that we should extend such treatment under the Hay-Pauncefote Treaty.

Attempts have been made by a far-reaching canvass to stampede our government into doing a great wrong to our people of this and future generations. Some of our people, without examining the contract, have developed a state of mind in which an insistence upon secure, moral and legal rights is viewed as a breach of treaty faith.

Money given by well-meaning and conscientious men to further peace has been diverted to spread reflections upon the good faith of this country in carrying out its treaty obligations.

We must be fair to others, but also true to ourselves, and unless men, no matter what their attainment or office, can bring better arguments than perversion of the Bard resolution, disregard of the true meanings of terms in international law, quibbling attempts to read into the present treaty superseded obligations of a treaty sixty-three years old and twelve years dead, and reflections upon the patriotism and statesmanship of Mr. Hay by insinuating that if he were alive he would say his clearly expressed safe-guarding of our interests was intended to favor Great Britain, such arguments should have no weight with open-minded and state-loving citizens of this country.

Why should the self-evident fact that we should stand fast to treaty obligations be an argument for abandoning our treaty rights?

There is not one word or phrase that even by implication denies our right to give free tolls to our vessels in any trade. I am satisfied that this is understood and that the strategy of present movements is that violent protests against remission of tolls on vessels in the coasting trade may make us content to rest our case there and not regulate commerce in the constitutional and more beneficial way to the nation by freeing our vessels from tolls in the foreign trade.

The CHAIRMAN. The Society will now take a recess until half past two, at which time we will continue the program.

[Whereupon, the Society took a recess until 2:30 p.m.]



### THIRD SESSION

Friday, April 25, 1913, 2:30 o'clock p.m.

The meeting was called to order at 2:30 o'clock p.m., with Secretary Scott in the chair.

The CHAIRMAN. Ladies and gentlemen: We were unfortunately unable to finish the discussion of the question "Does the expression 'all nations' in Article 3 of the Hay-Pauncefote Treaty include the United States?" At the conclusion of the next paper dealing with this matter, the question will be open for discussion, and I know I express the desire of the Society at large that there should be an exchange of views, because there could be no doubt whatever that where the views presented have been so inconsistent, there must be some members present who are impressed by this inconsistency and who can perhaps contribute to the elucidation of the matter.

It gives me very great pleasure to present to you a gentleman who is Professor of International Law in the Law School of Harvard University, and who will give us the result of his consideration of this all important topic—Professor Eugene Wambaugh, of the Harvard Law School.

#### DOES THE EXPRESSION "ALL NATIONS" IN ARTICLE 3 OF THE HAY-PAUNCEFOTE TREATY INCLUDE THE UNITED STATES?

ADDRESS OF MR. EUGENE WAMBAUGH, *Professor in the Harvard Law School.*

The Hay-Pauncefote Treaty is short. As usually printed, it covers only two pages. It contains fewer than nine hundred words, and more than three hundred of these are words of ceremony found at the beginning and the end of most treaties, these being instruments in which the form ranks almost as high as the substance. Thus it happens that in this short treaty only two-thirds, or almost exactly six hundred words, can be considered as indicating the rights and the duties which it creates or recognizes. In fact, the Hay-Pauncefote Treaty, though it bears to the Panama Canal a relation resembling that which is borne

to England by Magna Charta and that which is borne to the United States by the Constitution, is only from one-third to one-fourth as long as the treaty of 1903 with Panama and only about one-eighth as long as the Panama Canal Act of 1912. Hence, even without reading the Hay-Pauncefote Treaty one would be inclined to suspect that here is an instrument not always capable of indicating by its mere words the rights which it was meant to establish and to clarify.

This impression will be confirmed by reading the treaty. May the United States fortify the canal? Will the treaty continue to give rights to Great Britain in case that country shall be at war with the United States? In case of war between Great Britain and the United States, will the rights of other nations be in any way affected? In case of war between the United States and some country other than Great Britain, may that other country continue to use the canal for its merchant vessels, its transports, and its battleships? These are only a few of the problems not expressly and fully solved, but arising necessarily and obviously. There are other questions less practical and more theoretical. Thus, as the treaty is merely between the United States and Great Britain, can it be said that other countries really have any rights at all under it, and, if so, are those rights to be enforced only through Great Britain; and do other countries have any duties, for example, the duty to refrain from blockading the canal, and, if so, do any countries other than the United States and Great Britain have a right to complain of the infringement of those duties? These are questions on which the treaty certainly leaves room for discussion. Further, the words of the treaty, even as to matters rather minutely covered, sometimes suggest difficult questions of which it must suffice to give only one, namely, whether, under the clause prohibiting warships of a belligerent to sail from either terminus within twenty-four hours after a warship of another belligerent has sailed therefrom, it will be possible for one warship of a belligerent, by going to and fro through the canal like a shuttle, turning on the course a marine league outside each terminus, to detain permanently at one terminus or the other the whole fleet of the other belligerent.

The mentioning of such questions as these is not meant to carry an intimation that the treaty is framed carelessly. No, the lesson is simply that as to such an intricate collection of topics a treaty of six hundred words, however carefully framed, cannot cover the whole ground.

Yet these questions, and all others, must be answered. And how?

Obviously some lines in such a treaty, and also some spaces between the lines, must be understood to carry a caution that the reader must examine the whole context, the general intent, other similar treaties, the history of the negotiations, and general principles of law, and a still more emphatic caution that the reader must bear in mind the purpose of all treaties—the purpose that there shall be peace and not war, contentment and not irritation, equality and not inequality.

Some matters, however, are treated adequately. The “all nations” clause, it seems, is clear in itself; and, further, the lights thrown upon that clause by the context, by the documents referred to in the treaty, and by the general system of law prevailing in the two countries which are parties to it, are lights which are harmonious with one another and also harmonious with the natural verbal significance of the clause itself.

The “all nations” clause is as follows:

The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

On the very first reading almost anyone will say that this clause is clear and that there is no verbal ground for supposing the United States to be excluded from the hospitable phrase “all nations observing these rules.” Apparently the only reason causing the meaning to be questioned is that in this clause there are at least three features: (1) the guaranty to “all nations” of the right to use the canal, (2) the guaranty to “all nations” of the right to be protected against inequality and injustice, and (3), argumentatively, the exaction from “all nations” of the duty to obtain no unjust discrimination. Probably no one would object to including the United States among the nations profiting by the guaranties of use and of equality; but there are those who believe that the United States is free from the argumentative duty of obtaining no discrimination. This argumentative duty flows so clearly from the holding of rights under the clause, that this duty cannot be avoided without contending that the United States is not included among the nations profiting by the clause. Thus it happens that the peaceful phrase “all nations” becomes a battle ground.

There are at least five reasons—in addition to the words of the clause itself—for believing that the United States is included among “all nations.” These five reasons are independent of each other in the sense that any one of them is by itself enough to uphold this construction of the treaty.

First, the preamble says that the treaty is negotiated without impairing the general principle of neutralization established in Article VIII of the Clayton-Bulwer Treaty; and as that article expressly said that any isthmian canal should be “open to the citizens and subjects of the United States and Great Britain on equal terms,” it is reasonable to believe that the “all nations” clause of the Hay-Pauncefote Treaty, which is the only clause giving any rights to Great Britain, continues to give to Great Britain, in the absence of clear language to the contrary, a right that the canal shall be “open to the citizens and subjects of the United States and Great Britain on equal terms”—a result which is not achieved unless the “all nations” clause is construed as including the United States. Will anything but extraordinary language cause any one to believe that a right to equal terms with the United States; a right theretofore existing, was in this treaty abdicated by Great Britain?

Secondly, in Article II, which is the only place in which rights are given to the United States specifically and not merely as one of “all nations,” the rights are expressly said to be “subject to the provisions of the present Treaty”; and thus it is reasonable to believe that the United States is to be one of the “nations observing these Rules.” Does the United States profess not to be subject to “all provisions,” and do not the provisions include “these Rules”?

Thirdly, in Article III the United States expressly “adopts, as the basis of neutralization of such ship canal, the following Rules”; and thus again it appears reasonable to believe that this is to be one of the nations which in the very next paragraph are spoken of as “nations observing these Rules,” especially as part of this very rule, namely, the part requiring the rates to be “just and equitable,” is addressed distinctly and peculiarly to the United States. Does the United States not intend to be one of the “nations observing these Rules” adopted by itself?

Fourthly, the Hay-Pauncefote Treaty says in Article III that “the United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople \* \* \* for the free navigation of the Suez

Canal"; and as that convention in its first article says that the canal "shall always be free and open \* \* \* to every vessel of commerce or of war, without distinction of flag," and in its twelfth article emphasizes "the principle of equality as regards the free use of the Canal, a principle which forms one of the bases of the present Treaty," it seems reasonable to believe that in the "all nations" clause, the first rule which the Hay-Pauncefote Treaty lays down in execution of its asserted purpose to adopt "Rules substantially as embodied in the Convention of Constantinople," there should be a liberal meaning assigned to the words "The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic," and also to believe that only very clear language could permit the United States to enjoy a privilege of inequality—a privilege conceded to no nation by the Constantinople Convention. Is equality a virtue—or perhaps a policy—peculiar to the Old World and inappropriate to the New?

Fifthly, as in both Great Britain and the United States there is established by judicial decision—and also recognized and applied by well-known statutes—a doctrine requiring all pursuers of a public calling to serve all comers and to serve them without arbitrary discrimination, and as a canal, like a railway, is an instance of a public calling, it may well be contended that any treaty between these two countries is to be construed, if possible, in such a way as to recognize these duties, since the words of any treaty between these two countries are necessarily written in the atmosphere of their several—and in this instance concurrent—systems of local law, and that hence, in the absence of clear language to the contrary, the "all nations" clause, with its provision of "entire equality," is to be understood as including vessels of commerce and of war of the United States among those enjoying such rights, and as recognizing the rights of all vessels from other "nations observing these Rules" to be treated on the same basis as those of the United States. If the canal had been built, as the treaty permitted, not by the government but by individuals or by a corporation, the duty of treating all vessels, whether American or foreign, on the same basis would have been enforced by the United States for and against every nation, including itself; and it seems reasonable to believe that the equal rights and duties of Americans, British, and others were not affected by the adoption of the other alternative which the

treaty permitted—the building of the canal by the government. It should be borne in mind that the later acquirement of sovereign privileges from the Republic of Panama did not affect the rights and duties of the United States as to this matter; for in Article IV of the Hay-Pauncefote Treaty “It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the afore-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.” The obligation of the United States consequently remains what it was just after the Hay-Pauncefote Treaty. Doubtless there is a right to free transit for vessels engaged in constructing or maintaining or protecting the canal, such a right being covered by the words of Article II which say that the “Government shall have and enjoy all the rights incident to such construction,” and perhaps it is fair to say that all public ships of the United States are thus exempted, since all of them when using the canal are in a sense protecting it; but it would be an error to confuse such ships with ships in no way belonging to the government or used by it, and as to these wholly private vessels, though belonging to citizens of the United States, it is reasonable to contend that according to general principles of law, even without a treaty, there is a duty of equality. Let it be remembered that when a government engages in ordinary business, for example in the sale of intoxicating liquor, it is not performing a governmental function, is not exercising any rights of sovereignty, and is subject to the ordinary rules pertaining to such a business. Let it be remembered, too, that the conducting of a canal for general use is not the exercising of a governmental function, but is the pursuit of a business clearly belonging to the class of public callings and charged with certain peculiar duties. Is it conceivable that when the United States, by a treaty obtained when it was not as yet entitled to sovereign powers in Panama, arranged for possibly entering upon a public calling, it is to be understood to have intended to reserve in that treaty, otherwise than through the use of extraordinary language, a right to carry on that business in a discriminatory manner which its own courts and its own Congress, in dealing with similar callings, have pronounced unbusinesslike, impolitic, dishonorable, and illegal?<sup>1</sup>

These, then, are reasons—and doubtless others can be given—

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<sup>1</sup>This last line of thought has been presented more elaborately in an article entitled “Exemption from Panama Tolls,” *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 7, p. 233 (April, 1913).

for believing that the United States is included among "all nations observing these Rules," and that vessels belonging to the United States or to its citizens have the right of use, the right of equality, and the duty of observing the rights of others to similar equality, as prescribed in the "all nations" clause.

Of these five reasons, two appeal to words in the context of the treaty itself to show that the United States is to be one of the "nations observing these Rules"; two appeal to instruments referred to by the treaty; and one appeals to that general law which must have been in the minds of the persons framing and adopting the treaty and which should now be in the minds of the persons reading and enforcing it.

These five reasons may be condensed thus:

(1) It would require extraordinary language to authorize a belief that Great Britain, while still clinging to the neutralization article of the Clayton-Bulwer Treaty, meant to give up the right to use the canal on equal terms with the United States.

(2) As the United States gets no rights except "subject to the provisions" of the treaty, it must be understood to be one of the "nations observing these Rules."

(3) As the United States adopts the rules, it must be understood to be one of the nations observing them.

(4) It would require extraordinary language to show that the parties to the Hay-Pauncefote Treaty, while referring to the Convention of Constantinople, meant to establish a rule of inequality wholly hostile to the words and spirit of that convention.

(5) It would require extraordinary language to indicate an intent to depart from that doctrine of equality which by both English and American law is attached to all public callings.

All these reasons may be reduced to one—that as in these days equality is the only ideal justice, a treaty must be understood to establish equality unless there is emphatic language to the contrary.

Is there emphatic language removing from the United States the normal rule of equality and permitting the United States to make discriminations in behalf of its own citizens? Let the "all nations" clause be read again:

The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any

such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions or charges of traffic shall be just and equitable.

Does it not seem that this clause emphasizes equality rather than inequality? Yes; and it seems also that the United States may well pride itself both upon being the nation adopting these rules and also upon being included among "all nations observing these Rules."

The CHAIRMAN: Gentlemen, the question is open for general discussion.

Mr. JOHN H. LATANÉ. Mr. Chairman and Gentlemen: I wish to take up one or two points which have been brought up by Mr. Nixon, and also some points raised by Mr. Olney.

Mr. Nixon's paper was exceedingly interesting and suggestive. I should like to have an hour in which to discuss it. But there my commendation of the paper ends.

If you will just notice the clause that he laid so much stress upon (contained in the first draft of the Hay-Pauncefote Treaty)—"The canal shall be free and open to the vessels of commerce and war of all nations *which shall agree* to observe these rules,"—you will remember that he contends that the words "shall agree" show clearly that the United States was not included in the term "all nations." Now I will ask Mr. Nixon to apply exactly the same line of argument to England, and we have a complete *reductio ad absurdum*. If the use of the future tense excludes one of the parties to the treaty, it must necessarily exclude the other. Does Mr. Nixon mean to tell us that England is not bound to observe the rules of this treaty because she was one of the signers of this treaty and that the treaty was intended to bind only those Powers which should agree to it at some future time? He also appears to adopt as the fundamental basis of his paper the assumption that England's rights in regard to the canal are established and enlarged by this treaty; whereas, as a matter of fact, England's rights were restricted by this treaty, and Professor Wambaugh has shown very clearly that we can not, therefore, think for one moment that England gave up any rights under the earlier treaty unless that fact was very clearly stated in the Hay-Pauncefote Treaty.

In Mr. Olney's paper there were also some rather strange logical fallacies. In fact, his paper sounded like the argument of counsel in



a case. He used the term "United States" in three or four different senses. The paper was logical in form, but sometimes in referring to the "United States" he was referring to the Government of the United States, and sometimes in referring to the "United States" he was referring to the ships owned by American citizens. His whole argument was thus invalidated.

I object to his use of the term "customers" as applied to the nations using the canal. But if we assume that the United States has set up a baker's shop or some other commercial enterprise down there on the isthmus, and that the nations of the world are to be regarded as "customers," we may ask the question, "Are not the citizens of the United States also Uncle Sam's customers in regard to the canal?"

The whole discussion of this question as far as it relates to the treaties reminds me very much of a story told of old Governor Letcher, of Virginia,—*"Honest John,"* as he was affectionately called. After he retired to Lexington to resume the practice of law, a client came into his office one day and said, "Governor, I signed a contract here some months ago and I want to see if you can help me to get out of it." The Governor read the contract very carefully and then inquired, "Who drew this contract?" The client replied, "I drew it myself." The Governor then said, "I thought so! If you had gotten a lawyer to draw that contract, he would have left a loophole for you, but since you were fool enough to draw it yourself, you have stated your obligations under the contract so clearly that there is nothing I can do for you."

I am afraid that a good many treaties are made in the way that lawyers draw contracts. I do not believe it would be possible to draft a treaty so that Mr. Nixon and Mr. Olney, by the combined ingenuity which they have shown in their papers, would not be able to dig a Panama Canal through its terms if they wanted to do so, by the method of argument they have employed today.

It seems to me that we are bound to interpret this treaty in the light of the Clayton-Bulwer Treaty, to which reference is made in the preamble, and also to some extent in the light of the Treaty of Constantinople, which is quoted in the text. I will admit that the expression "all nations" and the clause containing it are not very clear; but I believe very firmly, from a study of all the correspondence in the case and of the situation of the two Powers at the time that the Hay-Pauncefote Treaty was being drawn up, that both England and the United States at that time believed that the term "all nations" did

apply, and that the other provisions there, except those specially excepted, likewise applied to the United States.

If we are to accept the interpretation that some people put upon this treaty, what becomes of Mr. Roosevelt's main ground of justification for the seizure of Panama? He claimed to be acting as the agent of collective civilization, exercising an international right of eminent domain. After that, having gotten the territory, we turn around and say, "The canal is our property, it is built with our money, and therefore our ships should go through free." Of course there is a very apparent fallacy here. "The canal is our property," meaning the property of the United States. "It was built with our money," meaning the money of the people of the United States," and therefore our ships should go through free,"—"Our ships"! What do we mean by "our ships"? "Our ships" are the ships of a small group of ship-owners, and they are not the ships of the people of the United States. That fallacy is very plausible, but it needs only to be pointed out to be apparent as a fallacy.

Professor ALBERT BUSHNELL HART (of Harvard University): Mr. Chairman, it is a very great pleasure to hear our international lawyers so cordially disagree, especially so to the observer and student of diplomatic history, because he feels sure that so long as he is active, there will still be new material for him to work upon and contrary views for him to set forth and to reconcile if he can.

As a student and historian of diplomatic affairs, I beg to suggest three different historical elements in this problem. Without taking ground upon the immediate issue of this debate, I wish to point out three things which must affect any judgment of any question relating to this treaty and to this controversy.

The first of these is that the Hay-Pauncefote Treaty is a residuum. It is not a creation of the diplomatists of two nations facing a new crisis and coming together to find a way out; but it is a deliberate alteration of a previous status, as is evident from the extracts so cogently set forth by Admiral Stockton and Mr. Nixon. It is clear that when this question first arose as a national question, which was about 1835, everybody in the United States took the ground that any canal that was constructed must be an international affair, in the sense that its use was to be common and equal to all nations. And why? Because the United States was one of the weak Powers. The United States was one of the Powers that might be shut out by any other

principle, and until very recently nobody ever suggested that there was any other principle fairly applicable to this difficulty so far as the United States was concerned.

The Clayton-Bulwer Treaty was not simply an international agreement with reference to the construction of a water highway at Nicaragua or Panama or anywhere else. It is much more than that. It was a division of a maritime empire, and it was so intended. Great Britain, then the greatest maritime Power in the world, with its great navy and its great commercial marine, and the United States, then the second commercial Power in its foreign shipping in the world, were both intimately interested in America, Great Britain occupying not simply a coign of vantage in its position in Canada, but, as a great commercial nation with its interests in the West Indian colonies, a greater interest than any other Power in view of the conditions of commerce, and holding a position of greater advantage toward that canal. But the Clayton-Bulwer Treaty was a triumph for the United States, in so far as it set forth the United States as an equal party to any canal and to any canal legislation that might ever be made. It was an acknowledgment, and for the first time, that in all maritime affairs the United States of America had an equal interest.

Some allusion has been made to the Monroe Doctrine. The Monroe Doctrine certainly cannot override a diplomatic agreement made and ratified in due form by both countries and in operation for more than sixty years, namely, the Clayton-Bulwer Treaty. The Clayton-Bulwer Treaty must have been in accordance with the Monroe Doctrine, because it was made by those persons and those only who had any authority in the United States to give an explanation to the Monroe Doctrine.

The second point is, that the conditions of the canal being so far changed that it has actually been constructed by one of the great Powers of the world, it makes a tremendous difference with all its relations. The idea of a canal built by a company, in which anybody may take stock, under the auspices of a great number of Powers, under the control of two of the principal Powers, who take upon themselves that great function, has gone by, and by the Hay-Pauncefote Treaty the United States has been acknowledged as the one Power that shall build the canal. But that is not all. It has not only taken that responsibility, it has not only assumed the moral risks, if you like, of making itself master of the canal strip, but it has put in hundreds

of millions of dollars of its own money; and, although Professor Johnson is to speak to-night, and whatever he says about canal tolls and the future we must accept, because no man has given so much study to that phase of it as he, yet it seems to me highly unlikely that the tolls will ever be much more than the expense of keeping the canal open, and you and I and our children are going to pay the tax for keeping that canal up. After all, something is due and certain consideration is due to the fact that the United States is the proprietor, and there is one fact connected with that proprietorship which we absolutely cannot get away from, and that is that the canal will never be used as a military engine in any way against the United States.

You may make treaties, you may legislate until "the cows come home," but you cannot make any treaty that can bind the great nations to permit other nations to use territory under its control to its hurt. Something will happen if we go into war and the ships of other nations, our enemies, endeavor to pass through the canal. Somebody will forget to close a bilge cock; somebody will forget to close a gate; something will somehow drift across the channel, and it will be a week before that ship can be gotten through. We all know there is no equality with us in that respect, and never will be. There is no treaty that can hold any country in the world to the use of the Panama Canal in a military sense contrary to the United States.

The third point is with reference to a thing which is hardly alluded to in this discussion, and that is the Constantinople Convention. What was that convention? It was eighteen years after that convention was made before it was ratified and put in force. And why? It was because the Constantinople Convention did not exactly accord with the status of things in Egypt.

Ladies and gentlemen, we all know that the great and controlling reason why Great Britain gave up her half share in the future canal was that she had the whole share in the Suez Canal, and it was contrary to reason that any great nation should actually be the possessor and controller of one of the two great waterways and should have a half interest in the other. Great Britain had to yield the point of any kind of control, had to yield the point of control to the United States, because she was exercising that control in another part of the globe.

I went through this Suez Canal a few years ago and it did not look English. It did not wear eyeglasses. It looked very Egyptian. The reluctant camels snorted their defiance of the competition which was

depriving them of their daily dates. Yet it was English, and it is substantially under the control of the British Government.

If you will read the whole of the Constantinople Convention, you will find other things than this clause to which I have referred; for instance, a clause to the effect that Great Britain shall have a right to intervene, if necessary, for the protection of the canal and the protection of its connection with its Red Sea possessions.

Again, all the world knows that the Suez Canal can never be used in a military way against the interests of England, and never will be. Sooner or later something will happen to a canal which is involved in anything of that sort. Suppose a war breaks out next week between Germany and England, how many German vessels will ever be allowed to go through the Suez Canal to attack the British colonies and commerce of Asia?

I think one of the best things would be a study of the Constantinople Convention with respect to the relation of England to the Suez Canal, and of the attitude and administration of that canal with regard to tolls. If Great Britain in the Suez Canal does treat the ships of all nations with impartial equality, there is an added reason for supposing that the British who made the Hay-Pauncefote Treaty expect the same principle to be applied here. If it can be shown that Great Britain practices discrimination in Suez, then that nation cannot come here with clean hands and claim the kind of preference or indemnity which, under its own rules of the Constantinople Convention, it does not accord elsewhere. But that is a matter of fact, which I leave to be settled by this honorable Society.

Mr. LEWIS NIXON. Mr. Chairman, I do not think there is much more to be said. The question is on the phrase "all nations which shall agree to observe these rules"; whether the mere fact that the nation which makes them might be considered as bound to observe them, puts that nation in the place of those who shall agree to observe them; and whether the mere fact of agreeing makes them a party to the contract. That has already been clearly touched upon in the correspondence between Lord Lansdowne and the representative of Great Britain in this country, where Lord Lansdowne said that the phrase "The nations which shall agree to observe these rules" was for the purpose of showing that Great Britain was not to be caught in a disadvantageous position in comparison with other nations; and those

other nations, it is very plain to see, were not the United States. I was very glad to hear Professor Hart. Speaking about opening the canal, he says it is to be free and open. On the question of "free and open," the most important thing said here today was the outlining of the differences which existed at the time the canal was opened and conditions existing now. We were told of this great expanse of territory to the north of us, of the stations which Great Britain has dotted around both the canal and all of her territory elsewhere, and we were told she had about seven millions of people at that time, and has now reached the great sum of ten millions; that we had twenty-three millions at that time, and have now reached one hundred millions. Our interests are there, and we own this territory just as much as if it were territory around the Mississippi Valley.

The fact too, which we were told, that Great Britain's control of the commerce of the world is overwhelming is very good evidence that she will be the great beneficiary of this canal. We were also told that we are not going to raise anywhere near the amount of money necessary for expense and upkeep of this canal and interest on its bonds, so clearly in opposition to the policy in connection with the Suez Canal where they charge up to 25 per cent, and when it gets to 25 per cent, they generally cut down the rate. Lord Lansdowne said that what he considers just and equitable rates shall be rates which will pay for cost of operation and the mere cost of interest. If he would apply that to the Suez Canal, which England so much controls through its control of a great block of stock, he would find the Suez Canal rates are the ones that are unjust and inequitable and not ours, because, whether we remit the tolls on our own vessels or not, whether we charge tolls on our foreign trade and the trade of the rest of the world, it is very probable we shall not raise much more than nine million dollars. Taking out of this the cost of operation at \$4,000,000, we shall have only that amount to pay interest on our bonds. So this inequitable condition, wherein we pay this great expense, exists as a subsidy to the foreign ships of the world and not to the ships of the United States.

There is some little criticism about the taking of the Panama Canal. That is a condition that was thrust upon us, as we all know. We were obligated to keep the isthmus open and to protect the neutrality and sovereignty of the isthmus on the part of Colombia. We have protected it, and it has changed the form of government. We have

a treaty with that government, which fairly covers the point. I claim that the "terms of equality" that are so much talked about here this afternoon, do apply within the field where they can apply, and that field is the field of neutral operation.

There is a very important thing that seems to be left out by so many in reading this rule, which I claim was entirely consistent with the policy of the operation of the canal as affecting belligerents, and that is that they forget the word "otherwise." They come down simply and solely to charges on traffic and forget the "otherwise" conditions which are just as binding as anything else. I have never seen a single meeting of the minds on the one great statement in connection with this canal—that is to say, that Article III covers the rules adopted for the purpose of neutralization. You cannot prove "neutralization" means equal treatment, because it does not. The mere fact is England put that clause in the first article of the Clayton-Bulwer Treaty and then in Article VIII it was stated if she extended these conditions and brought about a joint protection, which she never did, that she might then have equality of treatment. Those clauses do not follow and are not observed in this particular treaty which we have before us. I only wish that people who meet and bring up this question would read more carefully Rule I of Article III. It is for a definite purpose and clearly recognized by international law, and clearly recognized by every word in this treaty.

Rev. ROSWELL RANDALL HOES (Chaplain, U. S. N.): Mr. Chairman, I wish to make an inquiry simply as a matter of fact, not of opinion.

I have been informed that there is an error in that first chart, and if an error, no doubt inadvertently made. I have been informed the first treaty was passed by our Senate and rejected by England instead of being rejected by our Senate. What is the fact?

Chairman SCOTT. I will ask Mr. Nixon to give you response.

Mr. NIXON [pointing to chart printed on page 103]. That treaty was changed. That treaty as it stands there was rejected. That was the treaty drawn by Lord Pauncefote. It was submitted to the Senate and the Senate changed it, and then the changes were not satisfactory to Great Britain. That was the original treaty as submitted to the Senate. The Senate changed it so much that it could not be adopted by Great Britain, because we knocked out all contract rights. I believe I am right on that.

MR. CRAMMOND KENNEDY (of the District of Columbia). Mr. Chairman, that is the most astounding statement to be brought into a hall where some knowledge of diplomacy and of international law is supposed to exist!

Some time ago when Admiral Mahan wrote his article in favor of fortifying the canal, he made the statement that the Senate had rejected the treaty, the first Hay-Pauncefote Treaty, which had a distinct prohibition of fortifying the canal. Having a great respect for the admiral's ability, I undertook to show in the *New York Evening Post*, that instead of that being the fact, the very contrary was true—that the United States Senate had ratified or rather advised and consented to the ratification of the first Hay-Pauncefote Treaty containing that express prohibition of fortifications. The Admiral wrote to the *New York Evening Post* confessing that his trust in the authenticity of certain information which had been furnished to him—perhaps it was some of Mr. Nixon's literature—had been betrayed and that what I said was true; that the first Hay-Pauncefote Treaty containing that prohibition had been ratified by the Senate.

The Senate adopted a single amendment which the late Senator Morgan had opposed and on which he had written a minority report. That amendment provided in a few words that in case the defense of the United States by its own forces required it, the rules for neutralization, which have been dwelt upon so much, should give way; that is, nothing in the treaty was to stand in the way of the national safety of the United States, as it might be regarded by the government.

When that amendment was brought to the attention of the British Government, it rejected the treaty in toto, because, as Senator Morgan had argued, it might nullify the general principle of neutralization. It simply meant that all the covenants for neutralization and freedom of passage and equality of terms should go for nothing if, in the judgment of the United States, a crisis had arisen that required the practical abrogation of the treaty.

Instead of the earlier Hay-Pauncefote Treaty being, as Mr. Nixon has represented, the pro-British treaty and the later treaty being the pro-American treaty, almost the reverse of that is true. The first treaty was both the British and the American treaty, agreed upon between them both, with the single exception of the particular amendment I have mentioned. When that treaty was sent to Congress, we were told by the President of the United States—and remember that it had a provision in it expressly prohibiting fortifications, that it gave



us everything that we had ever claimed or that we really wanted. Yet here today we are told in this presence that the Senate had rejected that treaty, whereas the Senate advised and consented to its ratification, and the only thing that prevented its proclamation by the two governments was the provision for nullification, under certain possible conditions, of neutralization and equal terms.

Admiral Mahan was man enough to acknowledge that he had been misled as to a fundamental fact, and he made his apology accordingly.

Although I served under General Grant in the Wilderness when I was scarcely of age and have always loved my adopted country with my whole soul, I still have enough of Scottish blood—or British blood if you like to change the adjective—running in my veins to be aggrieved when any false charge is made against the mother country. It does not pay. We are of the same race, and we really, deep down, love each other; and all these foolish and ignorant words, sometimes venomous in their malice, that are uttered with a tendency to alienate the two peoples, are to be deprecated. I want to say, as earnestly and forcibly as I can, that never in modern times, nor perhaps at all in history were more sincere efforts made to bring about a friendly understanding and a fair basis of agreement between two governments than were made not only in the negotiations of the Clayton-Bulwer Treaty, but in the subsequent attempts to compose the differences that arose in regard to its true interpretation.

I want to read just a little bit of history. I hold in my hand the unanimous report of the Foreign Affairs Committee of the Senate,<sup>1</sup> except for that one dissent of Senator Morgan, and that was in the interest of the treaty, because he wanted it intact. In the course of that report, which was made by Senator Cushman K. Davis, who was well able to expound the law of nations, he refers to the conduct of Great Britain in regard to what happened after the ratification of the Clayton-Bulwer Treaty, and the complaints that were made from some quarters of the course that she pursued; and here is how these differences were composed. I read from page 6 of Senator Davis' report:

Conceding that all our contentions were just, as they manifestly were, as to the conduct of Great Britain, in holding to the mouths of the San Juan River after the treaty was ratified, and in raising a logging camp to the dignity of a Crown colony at Belize, and in her aggressions at Ruatan and the Bay Islands, these aggressions

<sup>1</sup>Senate Document, No. 268, Fifty-sixth Congress, 1st Session, April 5, 1900.

were intended by both governments to be corrected through the treaties made by Sir William Gore Ouseley with these three republics.

That is, the Government of Great Britain constituted a special mission to the Central American countries—Guatemala and Honduras and Nicaragua—for the express purpose of so changing and modifying her sovereign rights in these parts of the world, including her relations with the Mosquito Indians, as to bring those relations by treaty into accordance with the ideas and demands of the United States. Now, see how that was done!

Speaking of these Central American treaties, Great Britain made between 1858 and 1860, Mr. Davis said:

All these treaties were most carefully examined by the President of the United States, and were laid before Congress in his annual message in December, 1860.<sup>2</sup>

Congress expressed no dissent to them, or to the President's declaration that "The dangerous questions arising from the Clayton and Bulwer treaty have been amicably settled."

Mr. Chairman, it is an evil day when the official words of the President of the United States, addressed to our supreme legislature, can be whistled down the wind by assertions showing just as much malice, it seems to me, as ignorance.

"Congress expressed no dissent to them nor to the President's declaration that 'The dangerous questions arising from the Clayton and Bulwer treaty have been amicably settled.'"

Speaking for the committee, Mr. Davis said:

"We cannot now assert to the contrary—" Remember, this is the unanimous report which was made by the committee, with the qualification which I have named, and which was adopted by the Senate.

The Senate committee says:

We cannot now assert to the contrary, and, for the purpose of abrogating that treaty, we cannot insist that those questions are not settled.

But the President went still more fully and carefully into the matter and made the following conclusive statement, in which he points out the "discordant constructions" of the Clayton-Bulwer Treaty as the matter that is settled. He says—

<sup>2</sup>Richardson's *Messages and Papers of the Presidents*, Vol. V, p. 639.

That is, the President of the United States in an official communication to Congress, says :

The discordant constructions of the Clayton and Bulwer treaty between the two governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this Government.

Mr. Davis then goes on to say :

As no Congress from that day to this has disputed the validity and finality of this settlement, it can scarcely be justifiable now to set up those same "discordant constructions," or the alleged want of good faith in the British Government in executing the treaty, as a reason for declaring that the treaty is in fact abrogated."

My friend [Mr. Nixon] was dealing with the past, with what for a time had excited the public mind in the United States ; but Sir William Ouseley's special mission had been sent to Central America and Great Britain had removed the causes of complaint of the United States, as announced to Congress by the President.

Mr. Davis says further :

The President then proceeds to restate the actual controversies and the manner of their settlement, as follows—

This is a careful statement by the President of the manner in which the British Government made such changes as conformed the situation to the wishes of this government, and, he might have added, of the people.

This is the President's statement, as quoted by Mr. Davis :

In my last annual message I informed Congress that the British Government had not then "completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished. This confident expectation has since been fulfilled. Her Britannic Majesty concluded a treaty with Honduras on the 20th November, 1859, and with Nicaragua on the 28th August, 1860, relinquishing the Mosquito protectorate. Besides, by the former the Bay Islands were recognized as a part of the Republic of Honduras. It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted

by the Senate of the United States to the treaty concluded at London, on the 17th October, 1856, between the two Governments [The Dallas-Clarendon Treaty]. It will be recollected that this treaty was rejected by the British Government because of its objections to the just and important amendment of the Senate to the article relating to Ruatan and other islands in the Bay of Honduras.

Mr. Davis then says:

It is not possible to ignore a fact or situation so fully and impressively declared by the President in a message to Congress, and acquiesced in by the failure of Congress to signify any dissatisfaction toward the final settlement so declared, as to the only points of contention that had then arisen under the Clayton-Bulwer Treaty.

When the Senate came to ratify the Hay-Pauncefote Treaty now in force, it was done on the assumption and express declaration that nothing had happened, from 1850 to the date of the adoption of the new treaty, to impeach the good faith of Great Britain, or to impair the efficacy of the old Clayton-Bulwer Treaty.

I am in no physical condition to make a long speech, but Dr. Scott has inquired whether I do not want to say a word or two about the matter of neutralization and neutrality.

I do not know in what college my friend [Mr. Nixon] is professor of international law, but it seemed to me that all through his speech he was confusing two things that are very different, namely neutrality and neutralization. I am sorry to say that the Panama Canal cannot be said, in the strict and practical sense of the word "neutralization," to be neutralized. Neutralization cannot be maintained by one nation alone. The publicists all agree that an essential part of the definition of neutralization is that it shall be guaranteed by a sufficient combination of the great Powers to insure its maintenance.

Perhaps I may be pardoned for saying that it seems to me one of the great misfortunes of our times that the Panama Canal has not been, and is not now, neutralized, in that true and permanent sense. Suppose that, instead of the canal having been dug, God had made it. Suppose that in the dawn of creation instead of there having been the Isthmus of Panama, there had been the Straits of Panama. What nation, knowing the meaning of the "Freedom of the Seas," would have claimed the right to lay a finger on that connection between the

two great oceans, in any way destroying or impairing the equal use of it on the part of all the commercial nations of the world?

The reason why the United States is going wrong in this matter is, as it seems to me, that she has forgotten what she declared so persistently in the earlier stages of this great project—that whoever builds the canal, whoever pierces the great barrier of the Isthmus and weds the two seas, must do it for all mankind; and if the thing has that broad human character and world-wide interest, is it not better for all the maritime nations to recognize the fact and make such agreements among themselves as will preclude, as has been done for forty years in the use of the Suez Canal, any of these bickerings and heart burnings that are so to be regretted between countries that ought to be the best of friends?

Mr. LEWIS NIXON. Mr. Chairman, I make it a point to never take offense at what is said before my face, but had I not remained over, contrary to my original plans, my statements would have been put before you by the gentleman and I would have stood before you as one who had made a statement which was not exactly correct. That in itself by Mr. Kennedy was most outrageous because it was supported by the facts submitted by the State Department, of record in Congress, and known to everyone that discussed the treaties here before us.

The treaty of February 5, 1900, was rejected by the Senate. Here (indicating) is the official document by the United States Government, submitted by Mr. Root, prepared by Mr. Hay, and it says:

The Senate's amendments to the former treaty required, first, that there should be in plain and explicit terms an express abrogation of the Clayton-Bulwer Treaty; second, that the rules of neutrality adopted should not deprive the United States of the right to defend itself and to maintain public order.

And, third, that other powers should not in any manner be made parties to the treaty by being invited to adhere to it.

Mr. KENNEDY. That second one is the one that was put in by way of amendment against Senator Morgan's objection.

Mr. NIXON. I know it was put in, and they rejected that treaty, and made a new one, and I have here a copy of it as it was sent back

to Lord Pauncefote. In other words, it was never confirmed, which means it was rejected, and when the treaty came back to them Great Britain would not accept the modified form, and the whole thing was thrown into the process of discussion, and we finally came to the treaty of 1901.

Mr. KENNEDY. I want to disavow any intention to be discourteous and to say that I did not mean and do not now mean to impugn the gentleman's honest and honorable intentions; but I do say that the treaty which Mr. Nixon has there on the placard as having been "Rejected by the Senate," was ratified by the Senate, and that the only reason that it was finally rejected—because you understand when the rejection of Great Britain came back to the Senate, the Senate had to act on that—was on account of that second amendment to which you have referred.

Mr. NIXON. It was ratified by the Senate, with certain amendments, and I have not got the amendments in there, so that is the treaty. I do not want to make any error when I present a statement of absolute facts. That is the draft of the first treaty submitted.

Mr. KENNEDY. The thing you emphasize as being pro-British and that you have in there in red letters was the thing that the Senate ratified.

Mr. NIXON. I do not know whether they did or not. That original draft was not ratified.

Mr. KENNEDY. I beg your pardon!

Mr. NIXON. Some parts of it were kept in.

Mr. KENNEDY. The treaty which you have presented in that shape, the two being distinguished from each other, is a treaty that the Senate did ratify, but which, on account of a subsequent amendment against Senator Morgan's advice, was rejected by England and then—

Mr. NIXON. (Interrupting) I admit that.

Mr. KENNEDY. And then, when England's official rejection came back, the Senate could not ratify it again because it already had ratified it with that amendment, and it had been rejected by England. In other words, if Great Britain had not rejected the treaty just as it is there, with your red letters, it would have been the law today.

Mr. NIXON. The only point is that here are two state documents. I took the first draft submitted by President McKinley to the Senate. I took that from the treaty, and the treaty that was sent back was not the same. I have Senator Foraker's statement that it was ratified with certain amendments. It may be I have some wording of the ratified treaty in there.

Mr. KENNEDY. You have it all.

Mr. ALBERT BUSHNELL HART. Mr. Chairman, may I ask Mr. Kennedy a question? Suppose you wrote a letter to a man and said, "I will give you five dollars per ton for a carload of coal." Suppose he wrote back and said, "I accept your offer provided you make the price six dollars per ton." Is your contract ratified by that man?

Mr. KENNEDY. You do not need to ask that question of Mr. Kennedy or anybody else.

My complaint is that the provisions which Mr. Nixon has stated were pro-British and anti-American in his discussion of the treaty are the very things that the United States Senate accepted without change. The other amendment had nothing to do with the matter except, as Senator Morgan said, to nullify the whole business if the specified contingency arose.

Mr. NIXON. If I had not been here, it would have been assumed I made a wrong statement, which I have not done. You said it was a most outrageous presentation.

Mr. KENNEDY. I say it is a most outrageous thing to bring before a body of people that have debated this question, such a placard of the treaty, entitled, "Rejected by the Senate," and say these articles were pro-British and anti-American, and these other ones were the oppo-

site, when the United States Senate adopted and ratified every one of the articles which you have shown to this audience under the title "Rejected by the Senate."

Mr. NIXON. That (indicating) was in the ratified convention and that (indicating) is the treaty that was rejected,—in other words, you say "changed" and I am perfectly willing to adopt your theory; but there is nothing outrageous in my putting it here, because I put it here for the purpose of exhibiting to the members the meaning of the words "all nations," and that is all my purpose, to show that it did not include the United States.

Mr. KENNEDY. As soon as Great Britain was notified of that one amendment, the treaty which she would have ratified, *and which the Senate had already ratified* with that amendment, was returned to the Senate because Great Britain would not agree to it so amended.

Mr. WILLIAM MILLER COLLIER. Mr. Chairman, I want to say one word, with reference to the closing remark of Mr. Kennedy in his support of a measure of the policy of neutralization of the canal.

He says if God had made a strait where He made an isthmus, no nation that believes in the freedom of the sea would have permitted itself to have been excluded from the use of that canal! But God did not make a strait; He made an isthmus, and the barrier that He erected there was a bulwark for the defense of the western coast of the United States from any foe coming from the Atlantic, and a bulwark for the defense of the Atlantic coast against any foe coming from the Pacific. If a man can tear down that barrier and open that passageway, he certainly has the right to use that canal in such a way that it shall not be made a means of easier access to his coasts by his enemies.

The CHAIRMAN. Gentlemen, if there is no further discussion, I shall declare the discussion closed and pass to the next subject.

I am very happy to announce that our next speaker is Mr. Horace G. Macfarland, of the Bar of the District of Columbia, who will present his contribution upon the question, "Would a subsidy to the amount of the tolls granted to American ships passing through the canal be a discrimination prohibited by the treaty?"

I take pleasure in presenting Mr. Macfarland.



WOULD A SUBSIDY TO THE AMOUNT OF THE TOLLS  
GRANTED TO AMERICAN SHIPS PASSING THROUGH  
THE CANAL BE A DISCRIMINATION PROHIBITED BY  
THE TREATY?

ADDRESS OF MR. HORACE G. MACFARLAND, *of the Bar of the District  
of Columbia.*

My endeavor shall be to present as fairly and frankly as possible the case for the affirmative of the topic assigned. That is, to maintain that a subsidy to the amount of the tolls granted to American ships passing through the canal would be a discrimination prohibited by the treaty.

The United States at the present time, independent of any limitations imposed by treaty, possesses full power to discriminate in favor of her own shipping, or in favor of the shipping of any other nation, in any manner whatsoever. Without attempting to define the precise legal status of the United States in the Canal Zone, I may state, in the words of Sir Edward Grey, that "the United States has become the practical sovereign of the Canal," and it indisputably follows that as such practical sovereign it has an inherent power to order its affairs within the territorial limits of its sovereignty as its good pleasure may to it dictate. Such rules and regulations as it may make as a condition to the use of its own property by others would be matter of municipal and not of international law.

But before the United States became sovereign of the canal, it entered into a certain contract, commonly called the Hay-Pauncefote Treaty, which superseded, except so far as by its terms it expressly keeps alive, an older contract, the Clayton-Bulwer Treaty of 1850. The inherent, wide, unrestricted powers of the United States as sovereign of the canal are on all sides admitted to be restricted and narrowed by this contract. The precise amount of such limitation and restriction alone is in dispute. So acts of state that would otherwise have been purely matters of municipal law, in so far as they are, or may naturally and properly become, or give rise to, breaches of the obligations and duties imposed by the Hay-Pauncefote Treaty, become cognizable in international law.

It has been proposed that the United States should exact tolls from all vessels, irrespective of their nationality, equal in amount and in manner of imposition on like classes of vessels, and should then, by

means of a grant or subsidy to United States vessels, reimburse these vessels in the amount paid by them, respectively, as tolls. Certain bills having this reimbursement as their object were introduced in the last Congress, but failed of enactment. It is said that similar bills will be introduced in the present Congress.

You have heard this morning the construction of this limiting treaty ably discussed and its several interpretations shown. It is not the province of this paper to again discuss that treaty, but, adopting one interpretation of it, to consider whether a certain specified act would, or would not, be a breach of that treaty so interpreted, and in particular of Article 3, Rule 1, of the treaty. Let us assume, therefore, for the purpose of this paper, that the United States is now under a treaty obligation to hold the canal free and open to the vessels of commerce of all nations, observing certain specified rules, on terms of entire equality with the vessels of the United States so that there shall be no discrimination against such nations or their citizens or subjects in respect of the conditions, or charges of traffic or otherwise, and that such conditions or charges of traffic shall be just and equitable.

The matter is then brought to this single issue. Discrimination as to the charges of traffic, the amount of the tolls, being expressly forbidden, may the United States, after imposing and collecting equal tolls from all vessels of like classes using the canal, without regard to their nationality, then repay to American ship-owners, by a subsidy equal to the amount of the tolls collected from American ships, the charges of traffic previously exacted from them?

If the United States refunds by the grant of a subsidy to American vessels the exact amount of the tolls previously required from them, it is evident that the net effect thus produced is to permit United States vessels to make a voyage via the canal at the same cost as if no tolls were exacted for passage through the canal. Such American vessels would, therefore, other conditions being equal, be able to offer lower freight rates to shippers for such passage than could foreign vessels. The lower freight rates thus made possible would tend to divert to these favored vessels of the United States, traffic that otherwise might have fallen to vessels of other nations.

Such a subsidy would be a distinct detriment to foreign vessels and foreign states. It could only be met and neutralized by grants of equivalent subsidies by foreign nations to their vessels.

Every state possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows from this principle that the laws of every state control of right all the real and personal property within its territory as well as the inhabitants of the territory whether born there or not, and they affect and regulate the acts done or contracts entered into within its limits.<sup>1</sup>

That a sovereign state may grant subsidies to its own vessels is clear. That the grant of a subsidy by a state to a particular line of vessels owned by its nationals engaged in a certain trade between certain ports, large enough in amount to permit them to underbid the subjects of other Powers for the carrying trade of the world between those ports, is not in international law a ground for complaint by these latter Powers, no matter how much their commerce may be injured by such subsidies, is equally clear.

The right to grant subsidies is one of the attributes of sovereignty, inherent in every state. Such rights are commonly not deemed surrendered by a treaty unless express words clearly relinquishing the right appear in the body of the treaty itself. It is not to be thought that such a fundamental right as the power to grant a subsidy would pass by implication alone without express words.

It would scarcely be claimed that the setting out in a treaty between the United States and Great Britain of certain rules adopted by the United States as the basis of the neutralization of the Canal would bind any Government to do or refrain from doing anything other than the things required by the rules to insure the privilege of use and freedom from discrimination.<sup>2</sup>

Mr. Mitchell Innes, the British chargé d'affaires, in his note of July 8, 1912, says as to this point "it is true there is nothing in that treaty to prevent the United States from subsidizing its shipping, and if it granted a subsidy his Majesty's Government could not be in a position to complain." And Sir Edward Grey in the note of November 14, 1912, states that "His Majesty's Government did not question the right of the United States to grant subsidies to United States

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<sup>1</sup>Lawrence's Wheaton, 2 Am. Ed., p. 160.

<sup>2</sup>President Taft's "Memorandum to accompany the Panama Canal Act" of August 24, 1912.

shipping generally or to any particular branches of that shipping." The two notes protested against an anticipated grant of a particular sort or kind of subsidy only, against a subsidy calculated particularly with reference to the amount of the user of the canal by the subsidized lines of vessels. And it was intimated that if such a subsidy were granted it would not be in accordance with the obligations of the treaty.

In Sir Edward Grey's note of November, 1912, the character of the objectionable form of subsidy is more clearly delineated. It is said that the United States may be debarred by the treaty from granting a subsidy to certain shipping in a particular way "if the effect of the method chosen in granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the up-keep of the canal, or to grant a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice the rights secured to British shipping by this treaty."

It is not apparent that the United States could or would grant such a subsidy as would impose on British or other foreign shipping an unfair share of the burden of the up-keep of the canal, and it is supposed therefore that it is to those subsidies whose trade effect would be to "create a discrimination in respect to the conditions or charges of traffic" that the British note is peculiarly directed. The concluding clause of the paragraph above cited from this note is in the nature of an omnibus clause to safeguard against the unexpected or the unforeseen.

If all vessels irrespective of nationality, be required to pay equal tolls and all such vessels are secured by the treaty an equality of opportunity in so far as concerns the commercial use of the canal, the granting by the United States of a subsidy to United States vessels equal in amount in each individual case to the exact sum it had previously exacted from them as tolls, would in substance, although perhaps not in form, be equivalent to permitting these United States vessels to pass through the canal free of tolls. Such a subsidy would give United States vessels using the canal an advantage over those of other nations. It would make them toll free of the canal in all but name.

President Taft in his message sent to Congress,<sup>8</sup> sets out as the then opinion of the executive of the United States:

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<sup>8</sup>H. Doc. 343, 62nd Cong., 2nd Sess.

I am confident that the United States has the power to relieve from the payment of tolls any part of our shipping that Congress deems wise. We own the canal. It was our money that built it. We have the right to charge tolls for its use. Those tolls must be the same to everyone, but when we are dealing with our own ships, the practice of many governments of subsidizing their own merchant vessels is so well established in general that a subsidy equal to the tolls, as equivalent to the remission of tolls, can not be held to be a discrimination in the use of the canal. The practice in the Suez Canal makes this clear.

The true effect of the practice thus suggested by Mr. Taft is admitted by the Secretary of War in his annual report for the year 1911, page 54, in which he states, after affirming both the legal and moral right of the United States to pay the tolls on its own vessels:

Furthermore, I can see no difference, save in form (provided the tolls for other nations are kept reasonable, as we have also covenanted to do), whether the United States should make this appropriation out of her own Treasury to American vessels, by receiving the toll money from them first and repaying it to them, or by simply relieving them from the payment of tolls in the first place.

In the "Views of the Minority" of the Committee on Interstate and Foreign Commerce in the Panama Canal Bill<sup>4</sup> they state on page 4:

We contend that our right to favor our own shipping cannot be seriously questioned.

And on page 6:

We have a perfect right under the Hay-Pauncefote treaty to favor our domestic shipping, and *if* we have the right to collect the tolls at the canal and repay them, we certainly have the right to remit them in the first instance. *It is unnecessary to resort to a device or subterfuge in order to do indirectly what we have a right to do directly.*

The economic desirability of such a subsidy as is proposed is open to serious question. But the desirability, the necessity even, of a

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<sup>4</sup>Rep. 423, No. 2, 62nd Cong., 2nd Sess.

punctilious discharge of treaty obligations by this country, is beyond question. No country in the world should excel this in the exact religious observance of treaty obligations both in letter and in spirit.

Senator Root, the President of this Society, in his speech in the Senate of the United States, January 23, 1913, forcibly explains this necessity in discussing that provision of the Panama Canal Act that makes a discrimination between the tolls to be charged upon foreign vessels and the tolls to be charged upon American vessels engaged in the coastwise trade. He said:

The provision has caused a painful impression throughout the world that the United States has departed from its often-announced rule of equality of opportunity in the use of the Panama Canal, and is seeking a special advantage for itself in what is believed to be a violation of the obligations of a treaty. Mr. President, that opinion of the civilized world is something which we may not lightly disregard. "A decent respect to the opinions of mankind" was one of the motives stated for the people of these colonies in the great Declaration of Independence.

It is not becoming to the United States to resort to "a device or subterfuge" in order to do indirectly what it may not do directly.

The Supreme Court of the United States in the case of *Tucker v. Alexandroff*, 183 U. S., 424-437, said:

Treaties should be interpreted in a spirit of *uberrima fides* and in a manner to carry out their manifest purposes.

If the intention of the treaty is as we have assumed for the purpose of this paper, namely, to insure equality of opportunity to the vessels of all nations in the employment of the canal in their peaceful commerce, it would hardly seem fit that the United States should by the exercise of a right of sovereignty not expressly surrendered by the treaty, render nugatory the operation of the treaty in respect to the vital point of equality of tolls.

In the field of municipal law, in the administration of the statutes respecting the regulation of interstate commerce, there are many occasions in which the courts have looked to the result produced to declare whether or not there has been a breach of the law and have brushed aside as irrelevant the question of the innocency of the means used to produce the prohibited result. It has been repeatedly held

that the forbidden effect cannot be produced by otherwise legal means. Having held "that the giving or receiving of a rebate or concession whereby property in interstate or foreign commerce is transported at less than the usual rate is the essence of the offense denounced by Section 1 of the Elkins Act" (*Armour Packing Company v. United States*, 153 Fed., 1), little difficulty has been found by the courts and by the Interstate Commerce Commission in looking behind colorable pretense and deciding that to be unlawful which produces in effect discrimination, though *prima facie* it be, by itself, independent of the effect it produces, legal.

In contemplation of the act any methods however skilfully devised by which an unlawful result is effected become devices for the end attained. In such a case the law deals with the result produced and it is immaterial what means may be employed for the purpose. If the result is unlawful, the means employed come within the condemnation of the statute.<sup>5</sup>

It is to the end effected by the grant or subsidy calculated practically to the amount of the user of the canal by the subsidized lines of vessels, that we must look in our inquiry as to whether or not such a grant violates Article 3, Rule 1, of the Hay-Pauncefote Treaty, and if that end be discrimination the subsidy cannot be blameless.

The reason of the law or of the treaty, that is to say the motive which led to the making of it and the object in contemplation at the time, is the most certain clue to lead us to the discovery of its true meaning, and great attention should be paid to this circumstance. Wherever there is question of an obscure, ambiguous, indeterminate passage in law explaining or applying it in a particular case: where once we certainly know the reason which has alone determined the will of the person speaking we ought to interpret and apply his words in a manner suitable to that reason alone. Otherwise he will be made to speak and act contrary to his intention and contrary to his known views.<sup>6</sup>

The United States is a moral person having continuous personality and responsibility from one generation to another. It is a "perfect international person."<sup>7</sup>

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<sup>5</sup>Schomberg v. D. L. & W. R. R., 4 I. C. C. R., 630-654.

<sup>6</sup>Vattel, Book 2, Chapter 17, Sec. 287.

<sup>7</sup>Oppenheim, *International Law*, Vol. I, Sec. 63.

What is, and has been the "reason" that inspired and governed the United States in this behalf?

The object of the Hay-Pauncefote Treaty as declared in the preamble "is to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the general principle of neutralization established in Article VIII of that Convention."

Article VIII of the Clayton-Bulwer Treaty referred to in the foregoing preamble, is as follows:

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Article III, Rule 1, of the Hay-Pauncefote Treaty states that:

The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.



These present declarations in the treaty of 1901 must be read in connection with the long series of declarations and pledges of the United States to the impartial use of the canal by all the nations of the world.

Since 1826 the United States has always contended that the right of communication between the Atlantic and Pacific Oceans by the construction of a ship canal across the isthmus which connects North and South America, should be open to all nations on the payment of reasonable tolls; that this gateway and thoroughfare between the two oceans should be for the navies and merchant ships of the world; that all nations should have a free and equal right of passage. As President Polk said in his message of February 10, 1847, transmitting to the Senate the treaty of 1846 between the United States and New Granada, the then proposed construction of a canal was for "a purely commercial purpose in which all the navigating nations of the world have a common interest."

Lack of space prevents the quotation of this series of declarations here, but they may be found in Moore's *Digest of International Law*, Vol. III, Chap. IX, and documents there cited; "Neutralization and Equal Terms," *Am. Journal Int. Law*, Vol. 7, No. 1, p. 27; and in the messages of the Presidents.

As late as 1904 President Roosevelt in his special message to Congress of January 4th, said:

Such refusal (to conclude the Hay-Herrán treaty) therefore squarely raised the question whether Colombia was entitled to bar *the transit of the world's traffic across the isthmus*.

The great design of our guaranty under the treaty of 1846 was to *dedicate the isthmus to the purposes of interoceanic transit*, and above all to secure the construction of an interoceanic canal.

If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal.

The purpose of the Clayton-Bulwer Treaty of 1850 is clearly shown in that portion of the treaty in which both parties agreed that each should "enter into treaty stipulations with such of the American states as they might deem advisable for the purpose of more effect-

ively carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans for the benefit of mankind on equal terms to all and of protecting the same."

And in Article 8 of that treaty the parties agree "that the canals or railways being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

Mr. Rives, the American negotiator, was instructed to say to the British Foreign Office, in the negotiations that led up to the Clayton-Bulwer Treaty, that "the United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations on the most liberal terms and a footing of perfect equality for all. That the United States would not, if they could, obtain any exclusive right or privilege in the great highway which naturally belonged to all mankind."

Clearly these words of Mr. Rives in 1850 and the equivalent emphatic statements of President Roosevelt in 1904, state the reason which determined the will of the United States in respect to the canal.

We took possession of the Canal Zone; we built this canal for the benefit of mankind. We hold it charged with a public interest. We are in respect to it a trustee for humanity. Such was and is our true position, one universally so understood and continuously so declared by our public representatives for us.

It is only recently, when it has been widely realized that a vast expenditure has been made in constructing this great work dedicated to humanity, that a clamor has arisen for special privilege and preferential treatment for the vessels of the United States that may use the canal. It would seem that the noble conception of self-denial, that the "great design" of benefiting all the nations of the earth was more universally popular prior to the presentation of the bills for the concrete execution of the brilliantly planned ideal than it is now when these bills are paid or in course of payment.

However that may be, no one who reads the record of the United States' utterances on the subject of the waterway route between the

two oceans across the isthmus connecting North and South America can doubt that up to the period subsequent to the Hay-Pauncefote Treaty, subsequent to the acquisition of the Canal Zone by the United States, that the United States stood for equality of opportunity in the use of the proposed communicating passage between the two oceans on equal terms to all, without any reservation whatsoever.

As stated in the note of Sir Edward Grey, of November 14, 1912, the United States is in the unfortunate position of having demanded under a similar treaty provision equality of treatment for citizens of the United States in the use of certain canals of Canada. President Cleveland on August 23, 1888, in his message to Congress on the subject, said:

By Article XXVII of the treaty of 1871 provision was made to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion of Canada on terms of equality with the inhabitants of the Dominion, and to also secure to the subjects of Great Britain the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States.

The equality with the inhabitants of the Dominion which we were promised in the use of the canals of Canada did not secure to us freedom from tolls in their navigation, but we had a right to expect that we, being Americans and interested in American commerce, would be no more burdened in regard to the same than Canadians engaged in their own trade; and the whole spirit of the concession made was, or should have been, that merchandise and property transported to an American market through these canals should not be enhanced in its cost by tolls many times higher than on such as were carried to an adjoining Canadian market. All our citizens, producers and consumers, as well as vessel owners, were to enjoy the equality promised.

And yet evidence has for some time been before the Congress, furnished by the Secretary of the Treasury, showing that while the tolls charged in the first instance are the same to all, such vessels and cargoes as are destined to certain Canadian ports are allowed a refund of nearly the entire tolls, while those bound for American ports are not allowed any such advantage.

To promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, is to fulfil a promise with the shadow of performance.

The discrimination complained of was simply this: Canada, while nominally charging a toll of twenty cents a ton upon merchandise

both of Canada and the United States, alike, provided that there should be a rebate of eighteen cents per ton for all merchandise which went to Montreal or beyond, leaving, of course, but two cents a ton net charge upon such merchandise. In other words, goods could be carried to the principal Canadian market in that locality via canals for eighteen cents per ton cheaper than they could be carried to the competing American market. As the President well said, to promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, was to fulfil a promise with the shadow of performance. Upon the representations of the United States, Canada rescinded the provision for preferential tolls.

I regret that in my personal opinion the United States in the exercise of its right to grant subsidies may legally, by indirection, in effect discriminate in favor of its own vessels, contrary to the true intent of the Hay-Pauncefote Treaty; but it may well be urged that the United States is under an obligation, an imperfect obligation perhaps, punctiliously to discharge its treaty duties not only in letter but in spirit, and it certainly is preëminently fitting for a country of professed high moral standards to observe duties of imperfect obligation and not by an ingenious, but scarcely an ingenuous, grant of a subsidy calculated with reference to the amount of the user of the canal by the subsidized vessels, keep the letter of its promise, but deny to the promisee the substance of the thing for which he contracted.

[Secretary Scott here retired from the chair, Vice-President George Gray taking the chair.]

The CHAIRMAN. The next address upon the program is one by Mr. William Miller Collier, of the Bar of the State of New York, formerly Minister to Spain, who will discuss the negative of the proposition just discussed by Mr. Macfarland, to wit, "Would a subsidy to the amount of the tolls granted to American ships passing through the canal be a discrimination prohibited by the treaty?"

I now introduce Mr. Collier.

WOULD A SUBSIDY TO THE AMOUNT OF THE TOLLS  
GRANTED TO AMERICAN SHIPS PASSING THROUGH  
THE CANAL BE A DISCRIMINATION PROHIBITED BY  
THE TREATY?

ADDRESS OF MR. WILLIAM MILLER COLLIER, *of New York, formerly  
American Minister to Spain.*

The question assumes that equal tolls are collected from the ships of all nations by those in charge of the operation of the canal, and that thereafter subsidies of equal amounts are paid by the American Government to its ships. The fact that an actual tangible collection may not be necessary but that proper entries in books of account may accomplish the same result is immaterial. The vital fact is that an equal toll chargeable on all enters into the canal revenue and forms a basis for the determination of the charge that is reasonable and just in relation to the service rendered and the advantage secured—the charge that represents the proportionate share of the expense of operation and maintenance of the canal that ought to be borne by each and every ship making use of it. The subsidy that is paid, though equal to tolls, is neither taken from canal funds nor charged against them. No ship is excluded from using the canal, no ship disproportionately burdened, no ship exempted from tolls, although in the case of the subsidized ship the tolls are paid not by the carrier or shipper or consignee but by the government offering the subsidy.

I have been asked by those who have framed the program for this meeting to present such arguments as suggest themselves to me as tending to prove that such a subsidy is not a discrimination prohibited by the treaty. It is hardly necessary to say that an argument to support the legal right of the American Government to grant such a subsidy is in no sense an expression of opinion that such a subsidy would be a wise policy to adopt. All the objections urged by Professor Johnson, the Special Commissioner on Panama Canal Tolls, may be unanswerable, but they do not affect the question of the legal right of the government to grant them.

No rule of international law prohibits the payment of subsidies. The right exists unless it has been surrendered by treaty stipulation. It is an elementary rule of treaty interpretation that whenever a nation does not contract itself out of its fundamental legal rights by

*express* terms, the treaty must be so construed as to preserve those rights. Restrictions upon the sovereign right to legislate as to domestic affairs are not to be inferred if any other construction can be made without violating the canons of reasoning. The burden of proof rests upon those who would limit these rights in any manner or to any degree. The United States, then, may grant a subsidy in such form as it chooses unless its treaty obligations by express terms or absolutely necessary inference have restricted it.

I admit that Article VIII of the Clayton-Bulwer Treaty still secures to Great Britain equal rights with the United States as to tolls and conditions of passage, and that she, in common with the other nations that observe the rules fixed by Article III of the Hay-Pauncefote Treaty, has a right to the use of the canal on terms of entire equality for her ships, and without discrimination against them or against her subjects.

I contend that the equality between nations is given to them without discrimination when the passage of the canal is open to their ships upon conditions no more burdensome and upon the payment of tolls no greater than those imposed for the passage of ships of like character of any other nation; that the promise of equality of treatment does not abrogate that equality among nations that is incidental to their independence and their sovereign right to legislate as to their own interests; that the exercise of such a right does not destroy equality if the equal right of other nations to so legislate is conceded, but that, on the contrary, inequality results if such right be denied.

I contend that there is equality between ships and between citizens, and no discrimination, if they are all called upon to pay no more for a given service than anyone else, whether or not they are aided by some one else to make the payment; that it is immaterial whether the burden of the toll be lifted from the carrier and assumed by the shipper, the consignee, the ultimate consumer, or by a government.

It has been intimated that the payment of a subsidy equal to the amount of the tolls is equivalent to collecting no tolls at all. I believe that I have pointed out the vital distinction between this course and an exemption from tolls, and that the objection so strongly urged by Sir Edward Grey against the exemption of coastwise traffic, namely, that it prevented the ascertainment and fixing of tolls that were reasonable and just and imposed a disproportionate burden upon foreign commerce, is inapplicable to the system of paying subsidies

though they be equal to the tolls collected. As a matter of fact, such payment would naturally increase canal traffic and revenue and would tend to reduce all tolls in the future to the benefit of foreign as well as domestic shipping.

It is, however, also strongly urged against this proposed system that the granting of a subsidy equal to the tolls is a discrimination in that it is the use of the canal in such a way that the subsidized shipping acquires a special benefit or a special privilege, and also in that this shipping is given an advantage in competing with other shipping in a manner inconsistent with the treaty.

Let us consider each of these claims. It can hardly be believed that any privilege is inhibited by the treaty unless the ability to grant it was derived from the treaty. The privilege that the subsidy gives is that of drawing money from the United States Treasury, in return for some supposed benefit to the country. It is not a privilege of any special right or special benefit in the canal. Let it be repeated that the subsidy is not paid from canal earnings, nor does it directly or indirectly affect its revenue unless it be to increase it by stimulating traffic. The payment of the subsidy is an act in no way springing from or connected with ownership or operation of the canal. All the chargeable tolls being credited to the canal fund or deposited therewith, in legal effect, the subsidy is an appropriation of other national funds derived from other sources, and which the United States may expend as she sees fit. The aid thus given is not a violation of the obligation to keep the canal open on terms of equality without discrimination.

I now come to the charge that the subsidy equal to the tolls gives a special advantage to one competitor over another which is forbidden by the treaty or inconsistent with the obligations that it creates.

The opening of the canal on equal terms without discrimination does not carry with it a promise that competition between carriers will not be fostered by their respective governments, even by artificial means, nor that any particular form of aid or manner of giving it should be interdicted. The right of nations to subsidize was not in any way restricted. The British Foreign Office in its notes of protest against the Panama Canal Act admits that it does not "find either in the letter or in the spirit of the Hay-Pauncefote Treaty any surrender by either of the contracting Powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient,"

and it concedes the right of the United States to be equal in this respect to its own. As Great Britain unquestionably has the right to pay to her ships subsidies equal to the amount of the canal tolls they pay; there would seem to be no claim by her that the United States has not that right. Yet in another paragraph of Sir Edward Grey's protest it is said:

His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally, or to any particular branches of that shipping, but it does not follow therefore that the United States may not be debarred by the Hay-Pauncefote Treaty from granting a subsidy to certain shipping in a particular way, if the effect of the method chosen for granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this treaty.

The note of the British *Chargé d'Affaires* of July 8, 1912, made similar admissions and more clearly stated a supposed "distinction between a general subsidy, either to shipping at large or to shipping engaged in a given trade, and a subsidy calculated particularly with reference to the amount of the user of the canal by the subsidized lines or vessels."

The distinction is not a sound one in principle. How would a subsidy calculated with reference to the use of the canal violate the treaty, if, indeed, it violated it at all? In the same manner that any subsidy, general or relating to a given trade, would violate it and in no other, namely, by the granting of an aid that changed natural competitive conditions in a way favorable to the subsidized person, and gave to him an advantage that he would not possess without it. The aim and the end, the purpose and the result of all three methods of subsidizing that have been mentioned are the same. The rights and the duties of the competitors who are affected are the same. If one method be a violation of the treaty, all are; if one method be permissible, all are. And it is contended by me that all are permissible, because admittedly the treaty does not restrict the parties to it from fostering their own commerce and giving it help in its competition with other shipping.



The distinction that the British protest attempts to make between subsidies in aid of a given trade and those "calculated particularly with reference to the amount of the user of the canal" is not a genuine one, not a real one in its practical effect. There is no substantial difference in the results upon the relations of competitors between that which can be done by subsidies in favor of a given trade, the route of which lies through the canal, and a subsidy equal to the amount of the tolls paid for the passage of the canal. What substantial difference is there between a subsidy of \$6,000 per voyage granted to a ship of 5,000 tons for every voyage that she may make in a trade by a route leading through the canal and a subsidy calculated on the tolls she must pay, namely, \$1.20 per ton for each of the 5,000 tons? If the one method results in inequality of tolls, so does the other. If the one method works a discrimination, so does the other. If the one method gives to American competitors an advantage, so does the other. Yet it is admitted that a given trade may be subsidized. The usual form of subsidies, other than those given to aid in ship construction generally, is the very form I have just compared with the subsidy equal to the tolls, namely, a payment per voyage for a service by a designated route.

To make use of one form to accomplish what can be accomplished by the other is not the adoption of methods of subterfuge or evasion. In the very nature of things any subsidy of any kind granted by any nation whatsoever for a trade passing through the canal must take into consideration the cost of the right of the passage through it. It is impossible for the carrier to leave it out of his estimates of expense. It is equally impossible for a government granting him a subsidy to enable him to meet or to lower his expenses so as to compete more advantageously, to leave it out of calculation. Whether the subsidy be a lump sum, a mileage or voyage compensation, or an open repayment of the tolls, it inevitably aids the carrier, in whole or in part, in paying the tolls, and this result must have been foreseen and intended. It may, then, be repeated that the United States has the same right to grant a subsidy equal to the tolls that she has to exercise the admitted right to grant a general subsidy or a subsidy for a given trade.

*Suez Canal Subsidies.*—In the British notes of protest against the Panama Canal Act it is practically contended that the rules for the free navigation of the Suez Canal are to guide in the interpretation

of the Hay-Pauncefote provisions as to tolls, as well as to the rights of nations in time of war. Grant it for the purposes of argument. I insist that every nation of the world may grant subsidies to its ships using the Suez Canal, and may make them take the form of a payment of tolls, and I assert that as a matter of fact many of them do. This canal is owned by a private corporation, but Great Britain is the largest stockholder. The company may not have the right to exempt any shipping from the tolls, but the nations may each aid their commerce by paying the tolls paid by their ships. Here are some facts based upon the statements made by Mr. Lewis Nixon in a published letter to the Chamber of Commerce of the State of New York:

The Russian Government in 1909 appropriated 650,000 roubles *in exact terms* to pay the tolls of the merchant steamers of the Russian Volunteer Fleet both for tonnage and for all men, women and children carried. \* \* \* Austria specifically provides by law for the payment of Suez tolls on steamers from Trieste to Bombay, Calcutta and Kobe. The Swedish Government calculates its subvention to the Svenska Ostasiatiska Kompaniet to represent the amount of tolls paid by the ships of the company for passing the Suez Canal. \* \* \* The British P. & O. Company receives in subsidies enough to nearly pay all its canal dues, although it operates through the canal a number of boats apart from mail steamers. The North German Lloyd receives an annual subsidy on its vessels using the canal of \$1,385,000. Japan pays a subsidy of \$1,336,947 to the Nippon Yusen Kaisha for its steamers through the Suez to Europe. The Messageries Maritimes, the largest French company using the Suez Canal, was paid for its lines to China, Japan, Australia and Madagascar, \$2,145,990 in subsidies.

The right of the United States to pay subsidies on its ships using the Panama Canal must be the same. Surely no one will contend that we must forego this right and permit traffic to be diverted from the Panama Canal to the Suez to the lessening of Panama Canal revenue and the increase of the burden of expense that we must bear. Where, in the name of justice, is there equality if that right be denied to the United States?

The British Government invokes Article VIII of the Clayton-Bulwer Treaty as still securing it equal rights with the United States. What were the rights of the two nations as to subsidies under that treaty? It contemplated the construction of a canal by a private

company. That company would have been obliged to charge the same tolls upon the ships of both nations, but each of these nations would have been free to subsidize its shipping as it thought best for its own interests and could have made it take the form of a payment equal to the tolls, without violating the letter or the spirit of the treaty. The equities are not altered by the fact that the United States has built and is to operate the canal. The rights of Great Britain and other nations under the Hay-Pauncefote Treaty are not greater than they were under the Clayton-Bulwer Treaty. Those of the United States have not been lessened by the abrogation of the latter, even though its eighth article is maintained in force. That treaty was superseded to relieve the United States of disabilities, not to create additional disabilities. If it be said that the United States assumes the obligations and is subject to the restrictions imposed upon the company that was to construct the canal, it may be answered that all these she fulfills and complies with when, as operator of the canal, administrator of a public utility, she collects equal tolls from all ships, and turns them into the canal revenue, and makes that revenue the basis for the determination of the just and reasonable and proportionate charge. Thus her obligations are completely fulfilled. She retains her right of aiding her own shipping with a subsidy equal to the tolls. Thus her treaty rights are secured. Not only does nothing in the Hay-Pauncefote Treaty, or in the negotiations leading up to it, contradict these statements, but every circumstance with reference to which the negotiations were conducted corroborates and confirms them.

As a precedent to determine our treaty obligation, Sir Edward Grey cites the course of Canada under the Treaty of Washington of 1871 granting certain reciprocal rights in the canals of the two countries. Referring to a system of rebates established by Canada and to the protest of the United States against it as a discrimination, he says that it was abandoned "in the face of that protest." But a careful reading of the proceedings in that case shows that it can in no sense be regarded as settling a rule of law and that, instead of proving that Canada and Great Britain at any time viewed their obligations under the treaty in the manner claimed and that Canada's final action was an admission of the American contention, it proves the contrary. In brief, the facts of the case were that by the treaty certain canals were reciprocally opened to the ships and citizens of the two coun-

tries upon terms of equality each with the other. Tolls on the Canadian canals were annually fixed by Orders in Council. The rate on wheat and other grains passing through the Welland Canal was 20 cents, but during a long period of years a rebate of 18 cents was granted upon all wheat that was carried as far as Montreal. Thus the net rate to Montreal was 2 cents, while the rate to Lake Ontario and upper St. Lawrence ports was 20 cents. The American ports, Oswego and Ogdensburg, therefore, claimed that they were discriminated against in favor of Montreal, and the American Government claimed it was a violation of the treaty, being a denial of the equal treatment promised. Another discrimination was based upon the fact that the wheat, which was generally brought from the Upper Great Lakes through the Welland Canal in large ships, had to be transhipped into vessels of lighter draft to pass through the St. Lawrence canals to reach Montreal, and the rebate was allowed only in case the transshipment was made at a Canadian port. What was the nature of the steps taken to secure an interpretation of the treaty, or to obtain the rights of the parties? Diplomatic representations were made by the United States. Statements were met with contradictions; claims of rights were denied or met with counter claims. Occasionally slight modifications were made in the Orders in Council to meet the shifting interests of Canada, but the regulations always continued to be of such a character that the United States contended that they were discriminatory. There was never arbitration of the question, never an agreement as to interpretation, never an admission by Canada that the regulations violated the treaty. There was a resort to retaliation, argument failing. After years of claiming of rights whose existence was always denied, the President of the United States, by virtue of an Act passed by Congress, proclaimed the imposition of a toll of 20 cents per ton on all cargo carried by Canadian ships though the American Sault Ste. Marie Canal, which had theretofore been free of tolls. These tolls were to be collected as long as Canada continued the rebates and discriminations complained of. The next year Canada abolished them in order to gain free passage for her ships through the Sault Ste. Marie Canal. Thus ended, not a litigation, but a commercial war. No one can justly claim that a legal principle was established or that an interpretation of treaty rights was accomplished. If the position taken in the controversy can be invoked against one party, it can against the other. Canada never

admitted that what she had done was inconsistent with her treaty obligations, but in notes presented by the British Ambassador to the Secretary of State just prior to the termination of the incident and also after the abandonment of the system of rebates, she claimed that "every obligation of the treaty had been fully and unreservedly met;" also, that "holding firmly to their contention that they were justified in adopting the tolls and rebates, they consented to waive their rights, in this particular instance, and not re-establish the system of rebates and transshipment regulations" in consideration of benefits to be received by her; and in another place, "the Canadian Government, whilst holding to what they believe to be their right, were willing to waive that right." Still further the statement speaks of Canada as "maintaining what she believes to be her rights under the Treaty of Washington," and adds, "the difference of opinion which exists as to the treaty rights of the two countries is to be regretted, but it forms no ground for a charge that either country in maintaining its own views proceeds with a disregard of solemn obligations."

So far I have endeavored to ascertain the extent of the right of the United States to grant subsidies for its ships using the canal by considering those provisions of the treaty that impose obligations or place restrictions upon her. Let us now consider the measure of her rights as to subsidizing, either expressly or inferentially conferred affirmatively. As one of "all nations" she is given the same rights as any of them as to tolls and as to subsidies. She may use any method or form that they may. It is unnecessary again to quote Sir Edward Grey's admissions upon this point; but, in passing, it may be said that, as Great Britain and the United States are the only parties to the treaty, so far as they agree upon an interpretation of it, that interpretation is undoubtedly binding upon them and upon every one else, according to acknowledged rules of interpretation, and the agreement renders unnecessary and improper any further consideration of the meaning of the words used in the treaty.

Other nations may grant subsidies equal to the tolls paid by their ships. Such is their right, and it is not an illusory one. It is equal to that of the United States and is equally capable of exercise. Its exercise imposes upon them and upon their treasuries no different burden than it does upon the United States. To say that, because she owns or operates the canal, a payment in the manner indicated is not real, is to forget that the tolls enter into the canal revenue, and to

ignore not only existing but also enduring facts. First, a word as to present conditions. Conservative estimates as to expense of maintenance and operation and interest charges are \$30,000,000—a sum far in excess of any expected revenue. With the tolls on American ships as well as foreign ships applied to this expense account, any payment of subsidies by the United States must be made from other funds—funds that she is free to use as she wishes. To deny her the right to grant such subsidies as will increase the traffic and decrease the annual deficit is to impose upon her a disproportionate burden, to deny her equality of right. The day is never likely to dawn when the canal will be self-supporting, so greatly has its cost exceeded estimates. But suppose receipts ever did exceed expense and interest, what then? If we adopt the theory of Sir Edward Grey, rates should be reduced to make them reasonable and just; total charges ought not to exceed total expense; no one should pay more than a proportionate share of this. But suppose there should accrue to the United States a profit on operation, and suppose it is not our duty to waive it but that we may pass it to our treasury and use it for other purposes. It is then lawfully our money, honestly acquired. Will anyone outside of the United States claim a right to dictate or even to suggest how it shall be used?

The United States has a right to grant subsidies equal to tolls, then, because other nations have that right. Now it is most important to note that the right of the United States, though equal to that of other nations, in this matter, is not dependent upon their exercise of that right, for each is free to act according to its own interests as judged by itself. It is not a mere means of defense or of protection, but a right that may be used to secure an advantage.

Yet a consideration of the effect upon the United States if other nations could exercise any right of subsidizing which was denied to her, and the difficulty, if not the impossibility, of her preventing the exercise by them of any rights to subsidize that they may assert, fortifies the claim of the United States to such rights.

Has the United States any legal right to interfere with the right of other nations to grant subsidies equal to the tolls? Has she any effective means of enforcing the right? Does the use of those means entail difficulties so great that it is not to be presumed that the treaty contemplates that the United States shall make use of them? Can vessels of other nations be denied the use of the canal, upon payment

of the regular tolls, merely because they have received subsidies equal to the amount of the tolls? The treaty makes the canal open to all on terms of entire equality, if they observe certain rules. Not one of these rules has the slightest relation to aid that they may receive to enable them to compete for the world's traffic. The treaty gives no authority to prescribe further conditions or make other requirements—least of all, if those conditions or requirements conflict with the legislation of nations upon domestic affairs. Any attempt at exclusion, any exaction of an increased toll, with the idea of equalizing conditions, even though it might be claimed that conditions had been rendered unequal by the parties upon whom the increase was to fall, would seem to lack sanction by the treaty—in fact, to contravene its clearest expressions.

But it is urged by some that, independently of the treaty, the United States can protect itself from the effects of a subsidy granted by another nation by imposing upon the subsidized ship a countervailing toll equal to the amount of the subsidy received by it, similarly to the countervailing duties imposed by the United States and by the nations who are parties to the Brussels Sugar Convention upon importations of sugar from countries that grant a bounty upon its export; that the imposition of countervailing duties is lawful even though equality of tariff treatment has been promised by stipulations in most-favored-nation clauses. Despite the Sugar Convention and the laws of the United States imposing countervailing duties upon bounty-fed sugar, the inconsistent attitude taken by many of these very nations, in the matter, makes it questionable whether such a method of proceeding is consistent with international law. Several nations have openly and formally asserted that it is not justified by fixed principles or general practice. Germany, Austria-Hungary, and Denmark, all protested in 1894 against the American tariff Act that imposed such a countervailing duty, as being a violation of their treaty rights as most-favored-nations. Yet the two former had signed the Sugar Convention of 1888 containing a provision for the imposition of countervailing duties under just these circumstances. Mr. Gresham, the Secretary of State, sustained the protest and his report was submitted to Congress by President Cleveland with a recommendation for the repeal of the statute in order that we might not even seem to violate our treaty obligations. It is true that Mr. Olney, then Attorney General, at about the same time, gave an opinion upon a somewhat similar state

of facts and expressed a different view, and later this was adopted by Secretary of State Sherman. Russia has been as inconsistent in this matter as the United States. She protested vigorously against Great Britain's enforcement of a similar law, but she afterwards signed the Sugar Convention.

But if it be conceded that the modern practice of nations establishes their right, notwithstanding promises of equal tariff treatment, to impose increased duties to counteract bounties, what is the basis of the right, what the underlying principle? It is that the bounty itself creates an inequality of conditions. There are seemingly two views as to what *may* be done without violating treaty obligations or what *must* be done to fulfill them, and the difference of view seems to result from the difference between the traditional United States interpretation of the most-favored-nation clause and the European interpretation of it. The United States, apparently, claims the right to impose countervailing duties, but seemingly acknowledges no duty to do so—acknowledging no duty other than that of imposing them upon every nation if she imposes them upon one. She does not deny the right of other nations to establish such protective tariffs and to grant such bounties as they may see fit, but asserts the right to impose counteracting duties whenever her interests seem to require them. Suppose this principle were applied to canal subsidies, and the right but not the duty of the United States to impose increased tolls to counteract them and render them nugatory were admitted. What then? The exercise of the right would be nothing more than the declaration of the United States that she felt that her own interests would be advanced by such a course. Her denial of the duty would be an absolute admission of the right of other nations to subsidize. The right of the other nation being admitted, the right of the United States to subsidize could not be questioned. Moreover, even if the effectiveness of countervailing tolls as a protection to the United States against subsidy-aided competition is a complete answer to any argument that the right of subsidizing must be conceded to her because the exercise of such a right by other nations might injure her, it does not impair the validity and strength of the affirmative arguments that she possesses such a right. At the most it would only show that the right does not spring from the fact that others have it.

Let us now consider the other view referred to above, as to what *must* be done by a nation to fulfill its treaty obligations to give



equality of tariff treatment to others. It has been contended that "a country to which most-favored-nation treatment has been promised, may, if it gives no export bounty, justly complain that its rights under this clause have been destroyed by the admission into the territory of the other of imports from bounty-giving nations upon the same terms; that it is inconsistent with the spirit of such clauses to admit such bounty-fed articles, and that the clause demands that such unequal treatment be not permitted." Such were the arguments presented to the British Parliament when the sugar bounties were under consideration by it, as set forth in the officially published correspondence. I do not believe that the United States acknowledges any such duty, although a copy of this correspondence was attached to an instruction once sent by Secretary of State Sherman to the American Minister to Argentina, and seemed to be, in part, at least, expressive of his views. What would be the effect if such a principle were applied to canal subsidies? The United States would be under a duty, at the demand of any nation, to increase tolls upon the ships of any other nation to the point of rendering nugatory any subsidy of any kind granted by the latter that aided its ships in competing with others using the canal, whether the subsidy were direct or indirect, open or disguised. It was only when provision had been made for the offset of every kind and form of bounty upon sugar, that the several nations felt justified in signing the Sugar Convention. To have penalized the open bounty and to have overlooked the hidden bounty would have been as unjust as inefficacious. In order to discharge the duties that they assumed, these nations established regulations for manufacture under a bonded *régime*, for strict surveillance by customs officials, for the prevention of clandestine withdrawal and secret sales, and for the creation of a permanent commission that could inquire into and investigate and determine disputed questions of fact and solve complex legal problems. Such regulations were necessary to effectiveness; without effectiveness there could be no justice. Nearly all the interested nations were parties to that agreement and they had a great and a common interest in the accomplishment of its purpose, because the rivalry in the payment of bounties was depleting their treasuries and was not increasing their relative exports. Subsidies, like bounties, may be disguised. The most effective are often indirect. Their existence is often denied. The determination whether they exist and, if so, their amount, would entail a system of inquiry and investigation, of search-

ing and spying, of prying and probing, that would constantly create situations that would be delicate, difficult and dangerous. Is it to be believed that the treaty imposes upon the United States any such duty or gives her any such right? Is it reasonable to imagine that two nations should by an agreement between themselves thus attempt to interfere with the long-established, universally recognized rights of all the other nations to aid their commerce as they see fit, and to penalize them for the exercise of those rights? Would not such an interpretation of the treaty create such discord that the usefulness of the canal would be impaired and the very purpose of its construction be largely defeated?

[Thereupon, at 5 o'clock p.m., an adjournment was taken until 8 o'clock p.m.]

## FOURTH SESSION

Friday, April 25, 1913, 8 o'clock p.m.

The Society was called to order in the Red Room of the New Willard Hotel at 8 o'clock p.m., with Mr. Scott in the chair.

The CHAIRMAN. We are to have the very great pleasure this evening of listening to a gentleman who has been engaged for many years in the professional examination of the question upon which he is to speak, the United States Special Commissioner on Panama Canal Traffic and Tolls, Professor Emory R. Johnson, who will speak upon the subject, "What is the effect of the exemption of American coastwise shipping upon Panama Canal revenues?"

I take great pleasure in presenting Professor Johnson.

### WHAT IS THE EFFECT OF THE EXEMPTION OF AMERICAN COASTWISE SHIPPING UPON PANAMA CANAL REVENUES?

ADDRESS OF PROFESSOR EMORY R. JOHNSON, *University of Pennsylvania, Special Commissioner on Panama Traffic and Tolls.*

In recommending tolls for the Panama Canal it was stated that the charges should be so adjusted as to fulfil three conditions: The rate of toll should be low enough to enable the canal to compete actively with alternative and rival routes; the rate should not be so high as unduly to burden or seriously to restrict the usefulness of the canal; and the rate should be high enough to yield revenues that will make the canal commercially self-supporting.

These principles were adhered to in formulating the schedule of charges that were recommended to the President in August and which were established by the President by the proclamation of November 13, 1912. The charges fixed by the President were as follows:

1. On merchant vessels carrying passengers or cargo one dollar and twenty cents (\$1.20) per net vessel ton—each one hundred (100) cubic feet—of actual earning capacity.

2. On vessels in ballast without passengers or cargo forty (40) per cent less than the rate of tolls for vessels with passengers or cargo.

3. Upon naval vessels, other than transports, colliers, hospital ships and supply ships, fifty (50) cents per displacement ton.

4. Upon Army and Navy transports, colliers, hospital ships and supply ships one dollar and twenty cents (\$1.20) per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels.

The amount payable by the owners of vessels for the use of the canal will, of course, depend both upon the rate of tolls and upon the number of tons upon which the charges are levied. The President's proclamation of November 13, 1912, directs the Secretary of War to "prepare and prescribe such rules for the measurement of vessels and such regulations as may be necessary and proper"; and the rules to determine the tonnage upon which tolls shall be paid are now being formulated.

It is essential to bear in mind that the charges that have been fixed by the President for the use of the Panama Canal are not the highest rates that might have been imposed without restricting traffic, nor are the rates such that higher charges would have lessened the revenues from the canal. The tolls are neither all the traffic would bear nor have they been fixed with a view to securing maximum possible revenues.

The inference or deduction that may be drawn from this is that the rate of tolls is a factor that may be varied at will with reference to the revenue which it is or may be deemed necessary to collect from those who use the Panama Canal.

The other revenue factor that may be varied at will is the share of the tonnage that shall be required to pay tolls or shall be exempted from charges. With a given rate of tolls, the revenues will be larger if all vessels using the canal are charged tolls, and will be smaller if any class of vessels, as the American coastwise shipping, is exempted from the charges.

Conversely, it is also true that if it be desired to secure an income of a definite amount, as, for example, revenues that will cover outlays for operation, maintenance, interest, and amortization—revenues that will make the canal commercially self-supporting—the rate of tolls must be increased proportionately with any reduction of the tonnage resulting from the exemption of any class or classes of shipping from the payment of the charges.

These statements are, of course, mere truisms. There will be noth-

ing new or unusual about the Panama Canal finances. If the canal does not support itself, the taxpayers must support it. The amount required to meet the current expenses and capital costs of the canal can be derived only from the tolls paid by those who use the waterway or from the taxes paid by the public who own the canal; and, as regards the income from tolls, the sum received must be affected both by the rate of charges and by the share of the tonnage that is subject to or exempted from the charges.

It is estimated that \$19,250,000 will be required annually to make the canal commercially self-supporting. This total is made up of \$3,500,000 for operating and maintenance expenses, \$500,000 for sanitation and Zone government, \$250,000 which is the annuity payable to Panama under the treaty of 1903, \$11,250,000 to pay 3 per cent on the \$375,000,000 invested in the canal, and \$3,750,000 for an amortization fund of 1 per cent per annum upon the cost of the canal.

It has been ascertained by a detailed study of the traffic that might advantageously use the Panama Canal and of the rate at which that commerce is increasing that, during the first year or two of the canal's operation, that is in 1915, the ships passing through the canal will have an aggregate net tonnage of about 10,500,000 tons. Of this initial tonnage about 1,000,000 net tons will consist of shipping employed in the trade between the two seaboard of the United States. The evidence as to the past rate of growth of the world's commerce justifies the estimate that by the end of the first decade, that is, in 1925, the total net tonnage of shipping passing through the canal annually will be about 17,000,000 tons, of which at least 2,000,000 tons will be contributed by the coastwise shipping.

The shipping using the Panama Canal may conveniently be subdivided into three classes: That engaged in the coastwise commerce between the two seaboard of the United States, American shipping employed in carrying the foreign commerce of the United States, and foreign shipping carrying the commerce of the United States and foreign countries.

The probable volume of each of these three classes of shipping during the first year or two of the canal's operation and during 1920 and 1925 is shown by Table I.

TABLE I.—CLASSIFICATION OF ESTIMATED NET TONNAGE OF SHIPPING USING THE PANAMA CANAL IN 1915, 1920, AND 1925.

	Average per annum during 1915 and 1916.	1920	1925
Coast-to-coast American shipping.....	1,000,000	1,414,000	2,000,000
American shipping carrying foreign commerce of the United States.....	720,000	910,000	1,150,000
Foreign shipping carrying commerce of the United States and foreign countries . . . . .	8,780,000	11,020,000	13,850,000
Total.....	10,500,000	13,344,000	17,000,000

The gross revenue that might be secured from the Panama Canal if tolls of \$1.20 per net ton were levied upon all merchant vessels is shown by the following table. The table also indicates what share of the total receipts would be secured from American coastwise shipping if those vessels were not exempted from the payment of tolls.

TABLE II.—CLASSIFICATION OF ESTIMATED REVENUE OF THE PANAMA CANAL AT A TOLL OF \$1.20 PER NET TON.

	Average per annum during 1915 and 1916.	1920	1925
Coast-to-coast American shipping.....	\$1,200,000	\$1,696,800	\$2,400,000
American shipping carrying foreign commerce of the United States.....	864,000	1,092,000	1,380,000
Foreign shipping carrying commerce of the United States and foreign countries . . . . .	10,536,000	13,224,000	16,620,000
Total.....	\$12,600,000	\$16,012,800	\$20,400,000

It is thus possible that about \$12,600,000 per annum might be secured from tolls during the first two or three years of the canal's operation, if all vessels, American and foreign, were required to pay the tolls fixed by the President in his proclamation of November 13, 1912. If the Panama Canal Act stands unamended and the coastwise shipping is exempted from tolls, the initial receipts from the canal will probably amount to less than \$10,500,000 per annum.

The total traffic in 1925 will presumably amount to about 17,000,000 net tons; but in all probability the rate of tolls will by that time have

been reduced to \$1.00 per net ton upon merchant vessels. It will not be wise to charge higher tolls at Panama than are levied at Suez. The tolls at Suez are now \$1.20 per net ton and they have been reduced four times during the past decade. It is probable that the prophecy of de Lesseps will be realized and that the Suez tolls will, within a few years, be brought down to 5 francs, about \$1.00 per net ton. There is thus a possible aggregate revenue of \$17,000,000 per annum in 1925, obtainable from canal tolls, if all ships are required to pay the dues. The exemption of the coastwise shipping will reduce the revenue in 1925 to about \$15,000,000 a year, or to less than the estimated annual outlay for operation, Zone sanitation and government, the Panama annuity and the interest on the amount invested in the canal. The revenues would yield no surplus for betterments and nothing for the amortization of the \$375,000,000 or more which the people of the United States will have paid for the canal. These calculations indicate clearly that the United States will need to collect tolls from the owners of the ships engaged in the American coastwise trade in order to secure revenues large enough to meet the canal's current expenses and its capital charges.

Doubtless most if not all persons will agree that the Panama Canal ought not to be a continuing burden upon the general taxpayers of the country. It should be made commercially self-supporting, if that can be done—and it can be done within two decades—without unduly restricting the usefulness of the waterway to the commerce of the United States and to the trade of the world. The canal will have cost the people of the United States at least \$375,000,000. The interest and principal of this investment must be paid either from the funds secured by general taxes or from the revenues derived from canal tolls. Political prudence as well as sound methods of public financing make it advisable to require those who derive immediate benefit from the Panama Canal to pay a reasonable toll for the use of the waterway.

The United States should conserve its revenues. They are required in ever larger amounts for the promotion of the public health, for public works and for the maintenance of the military power and naval prestige of the United States. Taxes must inevitably increase, and it does not seem in accordance with political wisdom or social justice that the burden of carrying the Panama Canal should be thrown upon the Federal Treasury and the taxpayers of the country

instead of upon the producers, traders and shipowners who make profitable use of the canal in carrying on their business.

In advocating the policy of adhering to business principles in the management of the Panama Canal, it is not recommended that the rate of tolls should be high. Indeed, the schedule of charges fixed by the President establishes relatively low rates—rates that will not unduly restrict the use of the canal. The owners of the vessels that serve the coastwise trade will derive greater benefit from the canal than will the owners of any other vessels. Rates double those established by the President might be imposed without preventing the canal from being used by the coastwise carriers. In view of these facts, it seems just that those who derive immediate benefit from the use of the canal should pay reasonable tolls.

The CHAIRMAN. The discussion of the same subject will be continued by Professor N. Dwight Harris, Professor of European Diplomatic History in the Northwestern University, who has been good enough to come all the way from the middle west to be with us tonight to address us upon this subject.

#### WHAT IS THE EFFECT OF THE EXEMPTION OF AMERICAN COASTWISE SHIPPING UPON PANAMA CANAL REVENUES?

ADDRESS OF MR. NORMAN DWIGHT HARRIS, *Professor of European Diplomatic History in Northwestern University.*

To answer this question intelligently and with scientific accuracy, one should have at his disposal complete and accurate figures covering both the total revenues of the Panama Canal, and the precise amount of our coastwise shipping that will pass through the canal. At this time, before any test has been made of the earning capacity of the canal, and any exact summary of the coastwise trade of the United States exists, it is practically impossible to draw up any table or formulate any exhibit that will give an absolutely true and precise statement of the case. The most recent and reliable estimates covering the whole field carefully and accurately are those of Mr. Emory R. Johnson, United States Special Commissioner on Panama Canal Traffic and Tolls. Taking these as a basis, we have been able to construct the following table:



American coast trade	1915 & 1916	1920	1925	1935	1945
Estimated net tonnage.....	1,000,000	1,414,000	2,000,000	4,000,000	8,000,000
Revenue at \$1.20 per ton .....	\$1,200,000	\$1,696,800	\$2,400,000	\$4,800,000	\$9,600,000
Total tonnage passing through canal:					
Estimated net tonnage . . . . .	10,500,000	13,334,000	17,000,000	27,200,000	43,520,000
Total estimated revenue . . . . .	\$12,600,000	\$16,012,800	\$20,400,000	\$32,640,000	\$52,224,000
Estimated trade of other countries and foreign commerce of United States:					
Estimated net tonnage . . . . .	9,500,000	11,930,000	15,000,000	23,200,000	35,520,000
Estimated revenue	\$11,400,000	\$14,316,000	\$18,000,000	\$27,840,000	\$42,624,000
Percentage of loss from exemption of U. S. coastwise shipping . . . . .	9.52%	10.59%	11.27%	14.7%	18.38%
Expense . . . . .	\$19,250,000				

From this table it is seen that a large portion of the revenue expected from the canal will disappear each year, if the coastwise trade is exempted from tolls as provided in the recent bill passed by Congress. This will vary from 9.52% in 1915 to 18.38% in 1945; and it is clearly too heavy a burden to lay upon the earning capacity of the canal for many years to come, if the canal is to pay as a commercial venture. Mr. Johnson has estimated that an annual income of \$19,250,000 will be needed to cover the cost of such a self-supporting enterprise, which should include \$11,250,000 or the annual interest at 3% on the \$375,000,000 spent to construct the canal, 1% a year for a sinking fund, and the annual annuity of \$250,000 to Panama, in addition to \$3,500,000 required yearly for the cost of operation and maintenance and \$500,000 necessary for the sanitation and government of the Zone. If this estimate for expense proves approximately correct, it will take practically a decade before the under-

taking will attain to a paying basis, provided no discount is made to the coastwise trading vessels. It is expected that the canal will begin paying 3% by 1925, but some authorities contend it will not do so that early. And Senator O'Gorman, after a careful study of the hearings of the Committee on Interoceanic Canals, said he did not believe that the United States would get 2% within a generation.

If the United States should advance the difference between what per cent the canal is able to pay on the bonds during the first ten years and 3%, and the government should be reimbursed gradually during the second decade, it would without doubt be some years after 1925 before the accounts would show a balance. Now, if we subtract the estimated annual revenue to be derived from the coast-to-coast trade from the annual totals, the difficulty of securing a financial balance will be materially increased and the time when the venture will begin to pay will be pushed forward nearly to 1930, provided the coastwise trade develops as is anticipated, and the rate charged of \$1.20 per net ton for the passage of the canal remains unchanged. If this rate should be lowered to \$1.00 on and after 1925, the date when a favorable balance could be struck would not be reached much before 1935.

All the above presupposes that the tonnage passing through the canal will steadily increase from 10,500,000 net tons in 1915 to 43,520,000 in 1945. Colonel de Val, Chief Quartermaster of the canal, has estimated that the tonnage would only amount to 7,000,000 in 1915. In 1878, in the tenth year of operation, the amount of tonnage that passed through the Suez Canal equaled only 2,269,678 net tons, while the amount estimated by the United States Bureau of Statistics as tributary to the canal and likely to pass through that year was 6,312,742 net tons. If similar conditions should arise in the development of the Panama Canal traffic, it is apparent what a great falling off in the actual tonnage there might be from Mr. Johnson's estimates, accompanied by a corresponding decline in the estimated earnings. It is a curious fact that the estimates of the congress called by de Lesseps in 1879 and the Isthmian Canal Commission in 1900 for the net tonnage to be expected upon the opening of the Panama Canal are practically identical, being 4,838,000 and 4,574,000 tons, respectively. It would seem, however, as though the commission had overlooked the natural growth of international trade generally during the interval of thirty years. Allowing for this steady increase in the

commerce of the world and the time necessary for the readjustments of ship companies and of trade routes, it is not unlikely that the tonnage passing through the canal will actually reach a figure somewhere between 7,000,000 and 10,500,000 net tons. If this prove true, or Colonel de Val's estimate is correct, the date for attaining a paying commercial venture would be still further postponed. But we are by no means certain that the tonnage passing through the canal would rise to any such tremendous proportions as 17,000,000 in 1925, 27,200,000 in 1935, and 43,520,000 in 1945. The Suez Canal had been in operation 41 years before the net tonnage of the vessels passing through it annually exceeded 18,000,000. Even Mr. Johnson admits that it is doubtful whether the traffic of the Panama Canal will equal that of the Suez. If it should never equal the 18,000,000 net tonnage of the Suez, it will hardly pay, certainly not if no charge is made for the coast-to-coast vessels.

Mr. Johnson has estimated that the total coast-to-coast trade in 1909 was 3,000,000 tons, of which 89.5% was shipped by rail and 10.5% by water, and that in 1911 this total had reached 3,481,600, of which 85.8% went by rail and 14.2% by water. The Interstate Commerce Commission estimated that about 4,000,000 tons were probably shipped in 1912, of which 93% were capable of water carriage. If these figures are correct, it is evident that there was a gain of  $33\frac{1}{3}\%$  (in three years) in the general tonnage and an increase of 15% in the tonnage carried by water. If this rate of increase remains the same during the next thirteen years, the total coast-to-coast tonnage will be approximately 5,330,000 tons in 1915, and 10,000,000 tons in 1925, and the percentage carried by water through the canal would be 40% or 2,132,000 tons in 1915 and 90% or 9,900,000 tons in 1925. Reckoned in this way, the percentage of revenue lost by exemption of the coastwise trading vessels would be 10.8% instead of 9.52% in 1915 and 40.08% instead of 11.27% in 1925, thus forcing the United States to run the canal at a great financial loss during the first decade at least. Longer if foreign trade is not large enough to pay expenses. And, in place of an extra burden being placed upon foreign shipping to finance the canal, as claimed by Great Britain, a large portion of the expenses of foreign companies shipping through the canal would be borne by our government. Yet it is to be greatly doubted if our coast-to-coast trade will ever assume any such enormous proportions. To keep pace with such expansion, American

shipbuilding would have to take on an unprecedented activity. The amount of tonnage of the vessels engaged in coastwise trade amounted to only 3,537,750 tons in 1911, and this would have to be more than trebled in ten years, while the increase for the decade preceding 1911 was only 38%.

And it is doubtful whether the present lines would be able to develop with sufficient rapidity to secure and to handle properly this greatly increased coastwise traffic. For it would have to be done by the existing companies, as it is not the custom in this country to establish competing lines. "The coastwise men," said Mr. Adamson in the House debate, "are the most courteous and prudent on earth. When one establishes a line between two ports, the others leave him alone." This lack of competition must be considered as a factor likely to retard the development of traffic in any large scheme for the promotion of coastwise trade on extensive lines, such as indicated in the estimates.

The above calculations do not take into consideration what may happen, if the railways in the United States and the Suez Canal should reduce their rates materially. If this was done, the canal revenues would no doubt be correspondingly reduced; and it would be the part of wisdom not to impair the revenues by exemptions in favor of the coastwise trade until something definite is actually known concerning the real condition of the canal traffic after 1915. It is not expected, however, that the competition of the railways will seriously impede the development of the canal traffic, for two reasons. The water rates will probably control the coast-to-coast traffic after the canal is in full operation; and it is well known that the railways and steamboat lines maintain sympathetic relations. "We are friendly with them (the railroad traffic managers)," said the President of the American-Hawaiian Line when testifying in 1910 before the Senate Committee on Interoceanic Canals. "We discuss rates \* \* \*. We are not tied up; we are not committed. We do as we please, absolutely untrammelled. \* \* \* Our traffic manager doesn't attend the conferences of the railroads, but he goes to Chicago and gets his ear pretty close to the ground. That's his business."

It has been strongly advocated by some that the military expenses for the defense of the canal should be paid out of the canal revenues. To do this and to still have the venture a commercial success, it would be necessary to add to Mr. Johnson's budget estimate of \$19,250,000

the annual amount necessary to defray the cost of the military and naval defense, or \$9,700,000 according to the estimates of Colonel Goethals. This would necessitate an income of \$28,950,000 annually from the canal. To approximate such a revenue, it would be necessary to charge a rate of two dollars per net ton, such as the Suez Canal did on gross tonnage when it was first opened. If this were done, the Panama Canal would be on a paying basis by 1925, provided little or none of the traffic was diverted elsewhere by reason of the high rate, even if the coastwise trade was exempted from the payment of tolls. Not only could we pay for the military and naval defenses of the Canal Zone, but it would be possible before many years to maintain a series of naval stations all the way from New York to San Francisco, including those proposed to be erected in the West Indies, as well. For by 1945 the revenues from the canal tolls would, if the two-dollar rate was maintained, reach \$97,000,000. Thus foreign commerce could be made to pay, in a way, a goodly proportion of our military and naval expenses; and, if the United States was opening the canal as a purely selfish, business venture, there might be some reason for such action. However, there would seem to be no solid or defensible grounds for such an extreme policy; and our country will probably gain more in the long run, through a liberal than through a penurious policy. No one can with reason complain of a charge of \$1.20 with which the United States proposes to start the traffic through the canal, particularly as the Suez Canal toll rate has in this year been reduced to the same figure after 43 years of operation.

In his answer to Sir Edward Grey's contention that the exemption of the coastwise vessels would lay an undue burden upon the foreign vessels, Mr. Knox showed by figures taken from Mr. Emory Johnson's estimates that this loss would fall entirely upon the United States, and that it would be nearly twenty years before the British ships would be paying the actual cost of their own transportation through the canal. This is probably correct, if the rate of \$1.20 per net ton is maintained. If, however, as demonstrated by the table given above, the exemption of the coastwise ships postpones the lowering of the rate for some years, a good ground for the complaints of foreign states might arise. Such a contingency is not at this time sufficiently great or serious to warrant the use of diplo-

matic pressure. It would be better to wait until the facts fully justify the contention.

As a purely financial measure, the best authorities do not concede that the exemption of the coastwise vessels from tolls will materially increase our merchant marine, lower the price of commodities or reduce the coast-to-coast rates. "Free tolls will do little to build American ships—the testimony is practically unanimous for that," said Mr. Stevens in the House. And the reduction in time by water between the coasts will do more to reduce rates than free tolls. For, when the difference between the rail and water time becomes one of days instead of weeks, the railways will have to come to terms with the ship companies; and the steamship lines will base their rates not primarily upon the cost of the service, but upon what the traffic will bear. So the exemption of the United States coastwise shipping is, in its final analysis, a question of national economy based upon the broad subject of our own national commerce and merchant marine, and not a question to be seriously raised in a discussion of international commercial traffic or international comity. It should be taken up and solved in a serious and exhaustive study of the whole problem of ship subsidies and the scientific development of our merchant marine and our national commerce and trade. Nothing is to be gained by tinkering, or half measures. A great problem is at stake. It must be met squarely and seriously, and not confused with other developments or enterprises.

The CHAIRMAN. Is there any discussion upon this subject? If not, we will pass to the next subject, which is the question, "Has the United States the right to exclude from the use of the canal any class of foreign vessels, such as railway-owned vessels?"

As this seems likely to be a contentious question, we have two speakers, one taking the affirmative of the question, and the other taking the negative.

I am sorry to say that Professor Garner, who was to have been the first speaker this evening, telegraphs that he missed his train at Cincinnati, but that he was going to continue his journey at a later hour and will deliver his paper if he arrives in time.

I shall therefore call upon Mr. John Foster Dulles, of the New York Bar, to treat this subject.

It is a very great pleasure to introduce Mr. Dulles to you. He is a

recent graduate of Princeton University. He studied law in Washington, although he has forsaken the capital city to practice law in New York, and is well known to most of you here. I believe, leaving out an occasional appearance in court, this is Mr. Dulles' first formal appearance upon the lecture platform.

HAS THE UNITED STATES THE RIGHT TO EXCLUDE  
FROM THE USE OF THE CANAL ANY CLASS OF FOR-  
EIGN VESSELS. SUCH AS RAILWAY-OWNED VES-  
SELS?

ADDRESS OF MR. JOHN FOSTER DULLES, *of the New York Bar.*

If the United States is entitled to exercise sole and exclusive sovereignty over the Panama Canal, there can be no question that she may arbitrarily exclude from the canal whomsoever she will. Sovereignty necessarily implies such a right of exclusion, and, though a sovereign state frequently, by treaty, stipulates not to exercise this right in respect of the subjects of a foreign state, the right no less exists though held in abeyance.

On the other hand, if the United States exercises less than sovereign rights over the Panama Canal, the right to exclude may be qualified, or even non-existent.

It therefore becomes necessary to consider the international status of the canal and to determine whether or not the United States is entitled to exercise all the rights of sovereignty thereover; and, if not, the extent to which any qualification of sovereignty may correspondingly qualify the right to exclude.

I shall not here consider whether or not the United States has, by any treaty, agreed not to exercise the right of exclusion as regards the nationals of any one nation, but rather the more fundamental question of whether the United States has acquired or can acquire such a proprietary interest in the Panama Canal as implies this right of arbitrary exclusion.

I ask you, in the first place, to consider the international status of the Panama Canal as affected by its physical nature and geographic location.

The very obvious fact that the canal is a waterway is of prime importance from the international view point. It is settled beyond dispute that sovereign rights can be acquired over land much more readily than over water, and it is the exception rather than the rule when

one nation is entitled to exercise the rights of exclusive sovereignty over navigable water.

This differentiation of land and water as spheres for the exercise of sovereignty is practical rather than theoretical. It is not that navigable water may not be susceptible of subjection to the exclusive domination of one nation, but that the practical consequences of permitting this are abhorrent to the civilized world. Freedom of commerce and communication is vital to the prosperity of all nations; navigable water is the ideal medium for international communication, in that it covers a great portion of the globe, is not exhausted by use, and, generally speaking, is of no intrinsic value. In view of such considerations as these, there has been a well-defined tendency to circumscribe the right of one nation to acquire over navigable water an exclusive sovereignty from which it could derive no positive advantage but only such negative benefit as might indirectly result from crippling the commerce of other nations by depriving them of free access to such water. Admit the general principle that navigable water may be subject to exclusive sovereignty and it will follow that every nation would ultimately become an "inland" nation with all the economic paralyzation that such a condition involves. Vital, living needs have prevailed, and today we see established the general principle that *navigable* waters are in times of peace *international* waters and not subject to exclusive national control. This rule is subject to the qualification that where a body of navigable water is reasonably useful for commerce with but one or a limited number of states, such state or states may exercise exclusive sovereignty thereover. This for the reason that, as no nation need be traded with against its will, any nation can always control the utility of water admittedly useful for commerce with it alone. With this reservation, I believe it can be stated generally that all navigable water is, in times of peace, open to the innocent commerce of the world.

Whether or not this proposition, so broadly stated, finds acceptance, the narrower proposition that navigable water connecting two open bodies of water must itself be open, is well established. The United States is thoroughly committed to this proposition which it has enunciated and urged on numerous occasions, as, for instance, in negotiation respecting the Danish Sound and the Straits of Magellan.

The Panama Canal falls clearly under this rule. It is—*par excellence*—a waterway connecting two open seas. If in the past the



economic needs and practical necessities of the world's commerce have demanded and obtained the internationalization of the Rhine, the Danube, Danish Sound and Straits of Magellan, in spite of the opposition of states claiming exclusive sovereignty thereover, surely a strong case must be made to withdraw from the operation of the rule there applied, the Panama Canal, which far transcends them all in its importance to the world's commerce.

It cannot be questioned that were the Panama Canal a *natural* waterway, it would be a waterway open on equal terms to the world's innocent commerce. Is, then, the fact that the Panama Canal is an *artificial* waterway sufficient to give it a different international status from that which it would assume were it a natural waterway?

It is urged with great force that a canal constructed by American genius, with American money, traversing soil acquired by the United States must, *ipso facto*, be an exclusively national waterway. This argument leads me to consider for a moment a sphere of common law where a similar argument is raised with almost monotonous frequency. It is a well-settled principle of common law that where an individual devotes his property, time, money and enterprise to the construction of a work in which the public has a vital interest, the public acquires an interest therein and the work is said to be *affected with a public use*.

We have long been familiar with the application of this doctrine to railways, canals, hotels, etc., and modern economic developments have led to its extension to enterprises of a less obviously public nature, as stock-yards, dry docks, stock exchanges, grain elevators.

It has been insisted with the greatest vigor that this doctrine does violence to property rights, that works constructed by private genius, upon private property with private funds, must belong exclusively to the individual proprietor. But the courts have said: private property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. What matters it that an enterprise represents private investment and is directed by private genius? The proprietors have seen fit to devote themselves and their money to the construction of a work in which the public is vitally interested. They need not have done so. But having done so, arguments based on private property rights will not be allowed to prevail against the practical necessity of acceding the public certain rights therein.

In suggesting this common law analogy I do not mean that we should, in the domain of international law, adhere blindly to common law principles in determining *what* shall be deemed to be clothed with an international use. I do say, however, that when international law, following its own guiding principles, has determined that a given waterway should be affected with an international use, that then, as in common law, arguments based on the fact of national construction and ownership should not be allowed to prevail against the practical application of the principle.

Nor have such considerations prevailed. Rivers like the Rhone, Elbe and Danube have been impressed with international character despite the fact that, in portions of their length, they flow through the territory of but one nation. Narrow straits like the Danish Sound have been declared free and open to the world's commerce, though such straits may have been rendered available for commerce only by virtue of expenditure for lights, buoys, etc., made by the proprietary nation. Such instances as these show that when international law applying its own tests decides that national property should be affected with an international use, then practical application of this principle is made inexorably, and claims of national property rights, though theoretically sound, give way before it.

What then are the tests which international law proposes for determining the status of that portion of the earth's surface which here concerns us?

I have already indicated the formulation of the general principle that all navigable water is, *prima facie*, in time of peace, affected with an international use. And as this principle has developed as the expression of the practical needs and necessities of national life, it is natural that the rigor of its application has varied with the necessities of the case, thus leading to the formulation of narrower, derivative rules framed to meet conditions of unusually acute necessity, which fact accords them more unqualified recognition than the general principle itself. Such a rule is that already referred to, that a waterway connecting open seas must itself be open. This rule, framed as it was to respond to the more special instance of acute necessity on the part of the world's commerce, could hardly have contemplated a situation when its application is as urgent as in the case of the Panama Canal.

Thus international law, following its own guiding principles, apply-

ing its own tests, leads to the conclusion that the Panama Canal as a waterway connecting the Atlantic and Pacific Oceans is affected with an international use.

I desire to draw your attention to one or two other considerations which serve very strongly to reinforce this conclusion.

The circumstances attending the acquisition by the United States of the canal territory are fresh in the minds of all of us. Reduced to essentials, and stripped of pretense, is it not a fact that the United States acquired a portion of the territory of Colombia against her will, for the purpose of the construction of an interoceanic ship canal?

Let me again refer to a common law analogy which appears to me to be significant: An individual owns a plot of land indispensable for the construction of a railway. The company can not induce the proprietor to grant the right of way over his territory for a reasonable compensation. The railway company thereupon, by *condemnation proceedings*, takes the right of way from the proprietor against his will. But the private property thus taken from the owner against his will *must be devoted to a public use*. Upon this we insist unreservedly. Such a provision is incorporated in the Constitution of the United States and in the constitutions of most of our States. And whenever a State constitution has failed to contain such a provision, the courts have with unanimity held that a principle of such elementary justice *must* be assumed as underlying our theory of government and system of law.

Shall, then, the United States, in its dealings with foreign nations, abandon this principle? If elementary justice, as between citizen and citizen, and between government and citizen, demands that when property is taken against the individual owner's will the property must be devoted to a public use, can we deny that when as a nation we in time of peace take the property of another nation against its will, that such property must be devoted to an international use? We are not here dealing with a technical rule of common law, but with a broad principle of justice recognized as a basic principle of just and honest dealing.

I believe it a sound principle of international law, as of common law, that the territorial rights of no one nation should be allowed to interfere with the construction of a waterway of tremendous moment to the whole world. But when a nation, claiming, as the United States claimed, to be acting by virtue of such a principle, deprives another

nation of its territory against its will, it is absolutely essential that the property thus taken be devoted to an international use.

I desire to call your attention to yet another principle, namely, that of dedication to a public use. The essentials of such dedication are:

1. That a proprietor indicate by words or acts, as fully as the subject-matter will permit of, an intent to devote a portion of his property to a designated public use.
2. That the public accepts the dedication thus offered.

Applying these principles to the Panama Canal, there can be no question but what the United States has indicated its intent to dedicate the canal as an international highway for the use of the commerce of the entire world. For about seventy-five years we have consistently declared, reiterated and emphasized such a purpose. I believe that we have indicated our intent to devote the canal to an international use as fully and as completely as the subject-matter has permitted of.

That is, we have done this prior to the passage of the Panama Canal Act. Here for the first time we see indications of an intent to utilize the canal for purely national ends, as a means to benefit American commerce and to impose upon the world purely American policies. In the Panama Canal Act the United States evinces a desire to revoke its offer to dedicate the canal to an international use. But, could the offer be revoked? Could the dedication be denied?

Once an offer to dedicate is accepted, it cannot be revoked. And such acceptance need not be formal action. It is enough if other nations, relying on the offer to dedicate, change their positions so that, were the offer not carried out, they would suffer loss. The dedicator thereupon becomes estopped from withdrawing his offer. Such acceptance by estoppel is not unusual. In the very nature of the case it frequently occurs that an offer to dedicate is made to a portion of the public which has no properly constituted representative to make a formal acceptance. But individual members of the public, by acting in reliance on the offer, effectually accept it by estopping the offeror from withdrawing his offer.

And so it has been with the Panama Canal. For decades the United States has been holding out to the world its intent to dedicate the canal to an international use. And what nation of the world has not in some way acted or refrained from acting in reliance thereon? Not only have vast sums of money been expended, but treaty rights have

been waived, national policies have been abandoned and new ones adopted in reliance on the declared intent of the United States to dedicate the canal to the world's commerce.

How can we today revoke our promise, declare null and void our dedication? It is impossible. The reliance of the whole world upon our promise has estopped us from withdrawing it. Our offer has been accepted; our dedication is complete.

And what is the significance of our conclusion that the Panama Canal is affected with an international use? When I say that the Panama Canal is affected with an international use, I mean substantially what we mean when we say that private property, such as a railway, is affected with a public use. The proprietor continues to hold title to his property, he is entitled to impose tolls so as to secure a reasonable return upon his investment, he may make reasonable rules looking toward the safe-guarding, preservation and maintenance of his property, but upon him is imposed the positive duty of serving the entire public without discrimination. The correlative right to be so served is accorded the entire public.

And so it is with the Panama Canal. We make rules necessary properly to safeguard and police the canal. We may impose tolls to an extent necessary to secure a reasonable return on our investment. But on what theory can we exclude any class of foreign vessels such as railroad-owned vessels?

Such an exclusion cannot be justified as a refusal to serve competitors, as it applies to all railways and not merely to the few who may be in actual competition with the canal. In any case, it is well established that where property is affected with a public use, no discrimination can be made even against a competitor. I believe this is a sound rule and one equally applicable to property affected with an international use.

But an exclusion of *all* railway-owned vessels can only be explained as expressing a general public policy opposing railway control of water transportation.

What application has such a policy to the Panama Canal, which is neither a vessel nor a railway nor affected by the ownership of any vessel? Obviously none. To exclude railway-owned vessels from the canal is not to legislate *as to the canal*, but it is an attempt to use the canal as an instrument to legislate as to *foreign* vessels and *foreign* railways, not properly amenable to our laws. It is leg-

isolation by indirection similar to the suggested method of compelling stock exchanges to become incorporated by depriving unincorporated exchanges of the use of the mails.

Such legislation, which seeks by indirect means to accomplish what could not be done directly, is only justifiable, if at all, when the legislator has such peculiarly exclusive and absolute control of the instrument he uses that the use to which he puts it cannot be questioned even by those injuriously affected thereby. To use the canal as a club, to impose American policies on the world, implies greater rights therein than would flow from the mere right to legislate as to matters really affecting the canal itself. We have seen that even this latter right does not inhere unqualifiedly in the United States. How much less the right to use the canal as a means for legislating as to foreign vessels and foreign railways!

It is of the essence that an international canal be free from the operation of such national policies.

If it means anything that the canal is affected with an international use, it means that the canal is open to all without discrimination; no class of foreign vessels can be excluded.

The CHAIRMAN. The subject is open for discussion.

MR. CHARLES G. FENWICK. Mr. Chairman, I gather from the address of Mr. Dulles that he bases his contention that foreign railway-owned vessels could not be excluded from the canal on the general principles of international law rather than on any particular clause of the Hay-Pauncefote Treaty.

Rule 1 of Article IV of the treaty says that no discrimination shall be made in respect of conditions of traffic, and as far as discrimination goes it would seem that the treaty is not violated if foreign railway-owned vessels are excluded from the use of the canal together with American railway-owned vessels. But apart from the treaty, there are the general principles of international law, which forbid one who is in the position of a common carrier from imposing unfair restrictions upon the traffic handled by him. While this development of international law by analogy with the common law of Great Britain and the United States is very instructive, it seems to me that the first clause of Rule 1, that the canal shall be "open and free" to the vessels of all nations, contains a clear prohibition against the imposition

of any restriction not connected with the proper administration of the canal itself.

I want to pass from that to a further point. It seems to me, from the papers that have been presented by Mr. Johnson and Mr. Harris, that all the wind is taken out of the sails of the British protest. If, after all, the sum of \$1.20 per ton, which is to be the charge for vessels passing through the canal, is actually lower than what the United States could fairly charge in order to bring the returns up to the interest on the capital invested plus the cost of maintenance, it would seem that the exemption of American coastwise shipping will not result in imposing upon British vessels a heavier toll than they might fairly be charged.

What room can there be for protest from foreign countries, if they are actually charged less than they might fairly be charged? We have listened this afternoon to interesting papers showing unquestionably, as I think, that the United States may grant a subsidy to its own vessels. If the United States grants a subsidy in the indirect form of an exemption from tolls and that subsidy works no injury to foreign vessels which, even if the United States coastwise vessels were not exempted, might fairly be charged more than \$1.20 per ton, then it seems to me that there is little left of the British protest as far as practical results go.

But while the power conferred upon the President by Congress has not actually been exercised in a way to injure British shipping, it nevertheless remains true that the President has it in his power to fix, from time to time, such tolls as would amount to a denial to British shipping of equality of treatment. The fact that no injury has actually been inflicted does not satisfy the British Government that its shipping is secure against injury in the future. You remember that in the Northern Securities case, the Supreme Court of the United States decided that a company not otherwise subject to legislation on the part of Congress came within the provisions of the Anti-Trust Act because the company had it in its power to restrict commerce, if at any time it should seek to do so. Applying the same principle to the case before us, we must admit that there is some justice in the contention of Great Britain that equality of treatment is not being shown as long as the President has it in his power, whether he exercise the power or not, to fix tolls which might result in imposing an undue share of the upkeep of the canal upon foreign ships.

The CHAIRMAN. Is there any further discussion? Is there any desire to ask the speakers of the evening any questions? If not, I wish to make two announcements before declaring the meeting adjourned.

The banquet will be held in this room to-morrow evening at 7.30 o'clock. Procure your tickets from the Secretary this evening, in order that we may know how many will be present. To-morrow morning we are to have election of officers. It is the custom of the Society that a Committee on Nominations of five members be appointed for the purpose of recommending nominations. The Chair therefore appoints as such Committee of Five, to recommend nominations to fill vacancies for the ensuing year, Professor Woolsey as chairman, Professor Hershey, Admiral Merrell, Mr. Penfield, and Professor Wambaugh.

There being no further business to come before the Society this evening, we will now stand adjourned until ten o'clock to-morrow morning.

[Thereupon, at 9.45 o'clock p.m., the Society adjourned until to-morrow, Saturday, April 26, 1913, at 10 o'clock a.m.]



## FIFTH SESSION

Saturday, April 26, 1913, 10 o'clock a.m.

The meeting was called to order by Mr. James Brown Scott.

Secretary SCOTT. Gentlemen, there are two subjects which you will find enumerated on the program, which remain to be discussed, and I am very happy to inform you that Professor Garner, who was unable to reach Washington last evening, is here this morning and will read his paper. After his paper, which is the leading paper on the subject discussed last night, is read, we will take up the regular morning program, and I shall ask Professor George Grafton Wilson if he will be good enough to preside.

[Professor George G. Wilson, a member of the Executive Council, thereupon took the chair.]

The CHAIRMAN. Professor Garner, whose paper was announced last evening, has the affirmative of the question "Has the United States the right to exclude from the use of the canal any class of foreign vessels, such as railway-owned vessels?"

HAS THE UNITED STATES THE RIGHT TO EXCLUDE  
FROM THE USE OF THE CANAL ANY CLASS OF  
FOREIGN VESSELS, SUCH AS RAILWAY-OWNED  
VESSELS?

ADDRESS OF MR. JAMES W. GARNER, *Professor of Political Science  
in the University of Illinois.*

Apparently two classes of foreign vessels are excluded by the terms of Section 11 of the Panama Canal Act from the use of the canal. This section contains several provisions, one of which reads as follows:

From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock

ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. \* \* \* In all such cases the order of said commission shall be final.

Another provision reads as follows:

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Anti-Trust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

The purpose of the first mentioned provision is well known. It was designed to preserve competition between the transcontinental railroads and steamship lines operating vessels between the Atlantic and Pacific coasts, by prohibiting such roads from acquiring the

ownership or control of competing water carriers and thus monopolizing the traffic between the eastern and western parts of the continent.<sup>1</sup>

There are seven transcontinental roads wholly within the territory of the United States (the Northern Pacific, the Southern Pacific, the Great Northern, The Union Pacific, the Missouri Pacific, the Milwaukee and St. Paul, and the Santa Fe), though in fact, only one of them, the Southern Pacific, at present has any interest in water carriers that would probably make use of the canal if they were not excluded. This road owns more than half of the stock in the Pacific Mail Steamship Company, which operates vessels between San Francisco and Panama and has a fleet of vessels on the Atlantic engaged in traffic between New York and certain Gulf ports,<sup>2</sup> and it was assumed by Congress that the company would put on a line of steamers through the canal as soon as it should be opened for traffic.

An examination of the terms of the Panama Act will show that its purpose is not to exclude from the canal *all* railroad-owned ships. In the first place, the prohibition applies only to vessels engaged in competitive traffic with the railroad which owns or controls the said vessels. In the second place, the Act does not apply to vessels owned by railroads which are not subject to the Interstate Commerce Act of the United States. This brings us to the question whether any foreign railroad-owned vessels come within the purview of the law, and if so, whether the exclusion of such vessels from the use of the canal is a violation of the Hay-Pauncefote Treaty. As I have said, the Panama Canal Act by its express terms applies only to railroads that are subject to the Interstate Commerce Act. The first section of the Interstate Commerce Act declares, among other things, that

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<sup>1</sup>The Committee on Interstate and Foreign Commerce in its report of March 16, 1912, on the Panama Canal Act, thus stated the purpose of the provision: "The apprehension of railroad-owned vessels driving competition from the canal may or may not be exaggerated, but it is certain that the evil, which is only anticipated there, already exists in the coastwise trade on both coasts, as well as on our lakes and rivers. The evil is prevalent, recognized, and complained of. The proper function of a railroad corporation is to operate trains on its tracks, not to occupy the waters with ships in mock competition with itself, which in reality operate to the extinction of all genuine competition. In answering demands for the exclusion of railroad-owned ships from the canal, which in this bill or any other would simply amount to an amendment of the Act to regulate commerce, the committee thinks it wise, just, and opportune to broaden the amendment so as to serve the higher, wider, more pressing, and more necessary purpose of excluding the railroads from operating vessels in competition with their tracks anywhere in the coastwise trade generally or in the lakes and rivers." See also the *Congressional Record*, 62nd Congress, 2nd Session, pp. 1896, 10556, 10557.

<sup>2</sup>Hearings before the Committee on Interstate and Foreign Commerce, H. R. Doc. No. 680, 62nd Cong., 2nd Sess., p. 505.

its provisions shall apply to any common carrier engaged in the transportation of persons or property by railroad from any place in the United States to an adjacent foreign country or from any place in the United States through a foreign country to any other place in the United States. Since no railroads can be subject to the Interstate Commerce Act, which are not wholly or partially within the United States, it follows from physical necessity that railroad-owned ships of no foreign country can be affected by Section 11 unless such country is geographically contiguous to the United States. There are but two countries so situated, namely, Mexico and Canada. No European, Asiatic or South American railroad can be affected because no such railroads are or can be subject to the American Interstate Commerce Act. There are, however, two Canadian railroads which are subject to the Interstate Commerce Act, namely, the Canadian Pacific, which owns or controls by lease more than six thousand miles of lines in the United States, and the Grand Trunk Railroad, which has some fifteen hundred miles of lines in the United States. The former of these roads is transcontinental and is the owner of lines of steamships both in the Atlantic and in the Pacific Oceans. Vessels owned by this road, if operated through the canal, would, like those of the Southern Pacific, be engaged in competitive traffic with the owning road, and are therefore excluded from the canal by the Panama Act. That this road is subject to the Interstate Commerce Act with respect to its lines in the United States, whenever it is engaged in interstate traffic, there can be no doubt. It regularly complies with the terms of the Act in respect to the filing of schedules, the making of reports, etc., and it is often a party to cases before the Interstate Commerce Commission. The terms of the Panama Canal Act make no distinction between domestic and foreign railroad-owned ships, and the debates on the bill indicated that it was not the intention of Congress to make any such distinction, but to exclude from the canal the ships of any and all roads, American and Canadian alike, which are subject to the Interstate Commerce Act, and whose traffic is competitive with the railroads which own them. Representative Knowland stated in the course of the discussion of the bill that Section 11, in his opinion, would debar Canadian railroad-owned ships,<sup>3</sup> and this seems to have been assumed by all who participated

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<sup>3</sup>*Congressional Record*, May 16, 1912, 62nd Cong., 2nd Sess., p. 6594; also May 18, p. 6752.

in the debates. Senator Newlands expressed satisfaction that this interpretation of the bill removed the objection that the Act, while prohibiting domestic railroad-owned ships from using the canal, might leave open the door to the Canadian railroads to establish a steamship service through the canal, either by acquiring the ownership of vessels now owned by certain transcontinental railroads or by establishing new lines of its own.<sup>4</sup> For the reason that the Act was understood to apply to the Canadian railroads and would therefore be a violation of the Hay-Pauncefote Treaty, Representative Stevens of Minnesota, a member of the House Committee on Interstate and Foreign Commerce, declined to concur in the report of the committee.<sup>5</sup> It seems clear, therefore, that Section 11 was assumed to apply to Canadian railroads which are subject to the Interstate Commerce Act, and that there was no intention of making any distinction between them and domestic railroads, in respect to the exclusion of their ships from the canal.

Nevertheless, the British Government in its protest against the Panama Canal Act interpreted Section 11 as having no application to ships owned by foreign railroads. On this point Sir Edward Grey said in his dispatch of November 14, 1912, to the British Ambassador at Washington:

His Majesty's Government do not read this section of the Act as applying to, or affecting, British ships, and they therefore do not feel justified in making any observations upon it. They assume that it applies only to vessels flying the flag of the United States, and that it is aimed at practices which concern only the internal trade of the United States. If this view is mistaken and the provisions are intended to apply under any circumstances to British ships, they must reserve their right to examine the matter further and to raise such contentions as may seem justified.

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<sup>4</sup>*Congressional Record*, 62nd Cong., 2nd Sess., p. 10574.

<sup>5</sup>See his remarks in the *Congressional Record*, 62nd Cong., 2nd Sess., pp. 6922, *et seq.* Representative Adamson, Chairman of the House Committee on Interstate and Foreign Commerce, informs me that he drafted this provision of Section 11 and that he intended it to apply to all railroad-owned vessels engaged in competitive traffic, whether they were foreign or domestic. Representative Esch, another member of the committee, also informs me that the prohibition as interpreted by him applies to all Canadian roads which are subject to the Interstate Commerce Act the same as to domestic roads and that this was the understanding of the majority of the committee.

In case the Government of the United States interprets the Act to apply to Canadian railroads subject to the Interstate Commerce Act, as Congress seems to have assumed that it would, the British Government will doubtless file a protest against Section 11.

The other provision of Section 11, which excludes from the canal vessels engaged in the coastwise or foreign trade, if they are owned, chartered, operated or controlled by any person or company doing business in violation of the Act of 1890 to protect trade and commerce against unlawful restraints and monopolies, commonly known as the Sherman Anti-Trust Act, as well as the Act of 1894, and all other Acts amending or supplementing either of these Acts, is obviously directed against certain alleged steamship trusts, just as the provision already explained is directed against the expected trans-continental railway monopoly of competing water traffic through the canal.<sup>6</sup> That the great majority of ships likely to be excluded from the canal by this provision are foreign-owned, results from the fact that over ninety per cent of the foreign trade of the United States is now carried, in foreign ships. Moreover, by no possible construction of the terms of Section 11 can it be held to apply only to American ships. The language is plain and the debates on the bill show that it was aimed primarily against foreign, rather than domestic, shipping combinations and pools.<sup>7</sup> It seems to be assumed that it would be no violation of our commercial treaties to exclude such ships from entering American ports, and at the last Congress there was a bill before the House prohibiting all vessels, whether American or foreign, adjudged guilty by the courts of violating the Sherman Anti-Trust Act, from entering any American port or clearing therefrom, until the court should find that the combination of which they were members had been dissolved. This bill had the approval of the Attorney General, who, it is asserted, entertained no doubt of its constitutionality.<sup>8</sup> Furthermore the Department of Justice seems to assume that the courts already have such power, and two suits in equity are now pending in the United States District Court for the

<sup>6</sup>The House Committee on Merchant Marine and Fisheries asserted, in a report made a year ago, that over 90 per cent of the foreign trade of the United States was carried by foreign ships "that belong to rings, pools and combinations, and that between the steamship lines composing these combinations, there was absolutely no competition." Report No. 632, 62nd Congress, 2nd Session.

<sup>7</sup>*Congressional Record*, 62nd Cong., 2nd Session, pp. 7561-7563.

<sup>8</sup>*Ibid.*, p. 7563.

Southern District of New York, for the dissolution of the so-called Atlantic and Asiatic shipping pools composed almost entirely of foreign steamship lines.<sup>9</sup> The petition asks, among other things, that the defendants be forbidden from entering or clearing any of their ships or vessels at any American port of entry, so long as they shall continue to maintain the unlawful combinations and conspiracies with which they are charged. Whether the court has the power to issue a decree excluding them from entering American ports, there is a difference of opinion which need not be discussed here, but there can be no doubt that if convicted of violating the Sherman Act, they will be excluded by the terms of the Panama Canal Act from using the canal, and the exclusion will not be merely theoretical, for all the seven lines which are defendants in the Asiatic shipping pool case are engaged in trade between the port of New York and the Orient and will therefore presumably use the canal unless debarred.

Having shown that Section 11 of the Panama Canal Act makes no distinction between domestic and foreign vessels, we may now inquire whether the exclusion of the two classes of foreign ships against which this section is directed is a violation of the Hay-Pauncefote Treaty. Article III of the treaty contains the following stipulation:

The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise.

The language of this provision is broad in scope and makes no exceptions in respect to particular vessels which may have occasion to use the canal. The canal is declared to be *free and open* to all, subject only to the condition that they must observe those rules of the Suez Convention which are embodied in Article III of the treaty as the basis of the neutralization of the canal. Strictly construed, the language of the above quoted treaty stipulation undoubtedly confers a right

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<sup>9</sup>One of these cases is that of the United States versus the Prince Line, the Lamport and Holt Line, and the Hamburg-American Lines; the other is that of the United States versus the American-Asiatic, the Anglo-American Oil Line, the United States and China-Japan Line, and American-Oriental Line, the Barber and Dodwell Line, the American-Manchurian Line and the Isthmian Line. All these are foreign corporations except two.

upon every foreign merchant vessel and every war vessel, without exception, to use the canal, so long as it observes the rules adopted as the basis of neutralization. It follows logically, that the canal may be closed to any vessel which violates these rules, but only such vessels, since the exclusion of no others is contemplated by the terms of the treaty, either expressly or by implication. Now the Panama Canal Act, as stated above, undertakes to close the canal to two classes of foreign ships which are not excluded by the terms of the treaty. These are: (1) Certain railroad-owned vessels, and (2) all trust-owned or controlled vessels engaged in the domestic or foreign carrying trade of the United States.

Is it possible to reconcile the exclusion of these two classes of foreign ships with the principles of freedom and equality guaranteed by the treaty to the vessels of all nations? First, it might be argued that since the United States is the owner of the canal, it is, to a certain extent, in the position of a grantor in respect to the privileges conceded to the ships of other nations to use the canal. One of the recognized rules governing the interpretation of treaties by which one party grants to the citizens or subjects of another the right to travel or reside in its territory, engage in business, enter its ports, or use its harbors, rivers and canals for purposes of traffic, is that such rights shall be strictly construed and that they must be exercised subject to the local laws, and, although granted in general and apparently absolute terms, they may, in fact, be limited by reasonable restrictions imposed for the protection of the public health, morals, and good order of the inhabitants. Treaties of commerce and navigation not infrequently contain express reservations of this kind, a good example being the Convention of Commerce and Navigation between the United States and Great Britain of 1815.<sup>10</sup> Similarly, the Treaty of Washington of 1871, Article XXVI, by which

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<sup>10</sup>Article 1 of this treaty reads as follows: "There shall be between the territories of the United States of America, and all the territories of His Britannick Majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation respectively shall enjoy the most complete protection and security for their commerce, but *subject always to the laws and statutes of the two countries, respectively.*"



Great Britain granted to the citizens of the United States the right to navigate the St. Lawrence River for purposes of commerce, contained the reservation that such freedom of navigation should be subject to any laws and regulations of Great Britain or the Dominion of Canada, not inconsistent with the privilege of free navigation, and the right granted by the United States to British subjects by the same treaty to navigate the Yukon, Porcupine and Stikine Rivers, was subjected to the same conditions. Likewise, the right of British subjects to navigate Lake Michigan was granted by Article XXVIII subject to the same conditions. It is true that the Hay-Pauncefote Treaty contains no reservation of this kind, and it might therefore be argued that the privilege of using the Panama Canal is absolute and subject to no restrictive local legislation enacted in pursuance of the established public policy of the country owning the canal or for any other purpose whatsoever. But to this it could be replied, that the liberty granted by treaty to the citizens or subjects of foreign states to navigate the waterways of the country to which they belong is never understood to be absolute and unconditional, even though the language of the treaty is general in character, any more than the liberty of speech, of press or assembly allowed by municipal law is understood to be absolute and unlimited. Hence, it may be argued that it was not necessary to reserve expressly in the treaty the right to close the canal to particular ships adjudged guilty of violating the laws of the United States, enacted in furtherance of the well-established policy of the country to preserve competition in respect to traffic and to prevent monopoly, provided there is no discrimination or inequality of treatment.

The United States is a party to many commercial treaties by which the privilege is granted in general terms to foreign vessels to enter the ports and harbors of the country and to navigate its public waters, but it has never been contended that such privileges are in fact subject to no reasonable restrictions. On the contrary, it has always been understood that such privileges must be exercised subject to the local laws, and it is generally admitted that even public vessels, which have a right to enter the ports of any country independently of treaty stipulations, may be excluded for violation of the local laws in regard to quarantine, anchorage, pilotage, harbor police, etc.

The right of a government to limit by reasonable regulations treaty privileges granted in general terms, has long been defended by Great

Britain in the case of the right of American citizens to participate in the North Atlantic fisheries. By the convention of 1818 between the United States and Great Britain, it was agreed that the inhabitants of the United States should have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish on certain parts of the coasts of Newfoundland and other possessions of Great Britain, no mention being made in the treaty of any restrictions, except as to the territorial limits within which the privilege should be exercised. Furthermore, by the Treaty of Washington of 1871 (Article XVIII) it was provided that the inhabitants of the United States should have liberty in common with the subjects of Great Britain to take fish of every kind, except shell fish, upon certain coasts of British North America, provided they did not interfere with the rights of private property or with British fishermen in the peaceable enjoyment of any part of the said coasts in their occupancy for the same purpose. No other restrictions were referred to in the treaty. Notwithstanding this general grant of the right to take fish in certain British waters, the legislature of Newfoundland proceeded to enact laws prescribing a closed season during which fishing was prohibited on the treaty coast, and prescribing the methods and implements to be used in taking fish. The United States argued that the fishery rights conceded by the treaty were absolute and subject to no restraints imposed by the Government of Newfoundland without its consent.

The dispute was submitted to the Permanent Court of Arbitration at The Hague in 1910. In the argument before the court, the British Government put forward the following proposition:

As to the general principle which governs the construction of treaties such as this, it is submitted that the mere grant of a right or liberty to subjects of one state to do certain acts in the territory of another state, does not itself confer any exemption from the jurisdiction of the state in which those acts are done. There is hardly a nation in the world which is not bound by treaty to permit the subjects of some other Power to have access to its territories for some purposes—a liberty to trade is a common instance. But it has never been contended that grants such as these carry with them any immunity from the laws of the country which makes them, or that aliens trading under treaty liberties are not subject to the municipal laws which regulate the trade of the country. Grants of this kind are made on the understanding that they must be exercised subject to such laws and

regulations as apply to the subjects of the State which makes them. No State can be presumed to have been willing to put aliens in a better position than its own subjects, or to have renounced the right to regulate trade within its own territories, in the absence of express words to that effect, and the same argument applies equally to other liberties, including such a liberty as that which is now under discussion.<sup>21</sup>

The court decided that Great Britain had the right to make such regulations without the consent of the United States, provided they did not unnecessarily interfere with the fishery itself, and were not so framed as to give an unfair advantage to one of the parties over the other and were not inconsistent with the obligation to execute the treaty in good faith.<sup>22</sup>

But is the exclusion of railroad- and trust-owned vessels from the Panama Canal at all analogous to the restrictions imposed by the Government of Newfoundland on the exercise of the fishery privilege? These latter restrictions were justified by the British Government on the ground that they were a reasonable and necessary means for the protection and preservation of the fisheries and were also in the interest of public order and good morals, and it was upon these grounds that the right of the Newfoundland Government to impose them was affirmed by the Hague Court. The grounds upon which the United States proposes to close the canal to railroad-owned and trust-controlled ships have no relation to the protection, police or orderly use of the canal or the maintenance of public order or good morals in the Canal Zone. In the case of railroad-owned vessels, the exclusion is defended as a reasonable measure for preserving to the people of the United States the benefits of competition between

<sup>21</sup>Proceedings in the North Atlantic Fisheries Arbitration, Vol. 4, pp. 36-37, Senate Doc. No. 870, 61st Cong., 3rd Sess. Speaking of the American contention, Mr. W. E. Hall remarks (*International Law*, 5th ed., p. 339): "In other words, it was contended that the simple grant to foreign subjects of the right to enjoy certain national property in common with the subjects of the state carries with it by implication an entire surrender, in so far as the property in question is concerned, of one of the highest rights of sovereignty, viz., the right of legislation. That the American Government should have put forward the claim is scarcely intelligible. There can be no question that no more could be demanded than that American citizens should not be subjected to laws or regulations, either affecting them alone, or enacted for the purpose of putting them at a disadvantage."

<sup>22</sup>Proceedings in the North Atlantic Coast Fisheries Arbitration, Vol. 1, p. 85. See also an article by Robert Lansing, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, January, 1911, pp. 1, *et seq.*

the transcontinental railroads and steamship lines operating through the canal, by prohibiting such roads from owning or acquiring control of competing water carriers and thereby obtaining a monopoly of the transcontinental carrying trade. In the case of vessels engaged in the foreign trade, found guilty of violating the anti-trust laws, exclusion from the canal is purely and simply a penalty imposed for such violations and, like the exclusion of railroad-owned ships, has no relation to the protection of the canal or the preservation of the local public order or morals. The closing of the canal to both classes of ships can be defended, if at all, only as a measure for promoting the well-settled public policy of the United States in respect to monopolies and combinations in restraint of trade. But it might be contended, and doubtless will be contended, by the British Government that considerations of what a nation may be pleased to denominate its established public policy in respect to combinations in restraint of trade, afford no justification for imposing restrictions upon rights of navigation granted by treaty, especially when such restrictions amount to a denial of the privilege. Since every nation determines for itself its own public policies, if it were allowable to subject the enjoyment of a treaty right to such restrictions and conditions as the grantor nation might judge appropriate for the maintenance of such policies, and to prescribe as a penalty for the violation of general laws enacted in pursuance thereof the withdrawal of the privilege granted, manifestly the restrictions and penalties might be multiplied without limit and the treaty right reduced to nothing.

It may be seriously doubted, therefore, whether the exclusion of the two classes of foreign vessels from the canal can be reconciled with the treaty. It is one thing to regulate the exercise of a treaty right in respect to the navigation of domestic waterways, by prescribing appropriate and reasonable police regulations for the protection and orderly use of the waterway which is the subject of the right; it is quite another thing to prescribe as a penalty for the violation of laws enacted in furtherance of the general public policy of the grantor nation—laws in which the element of police control is lacking—the withdrawal of a plainly granted treaty right. The exclusion of ships in this case is not for violation of laws enacted for the protection or police of the canal, but for violation of other laws which have no relation to the exercise of the privilege granted by the treaty.

It might be contended that inasmuch as Section 11 of the Panama

Act does not discriminate against any nation, or the citizens or subjects thereof, but treats all alike, it does not violate the treaty. If it excluded railroad-owned and trust-controlled vessels belonging to certain foreign nations, or to all foreign nations, and at the same time permitted those of the United States to use the canal, Great Britain might justly claim that the equal treatment provision of the treaty was violated. But there is no discrimination here in favor of the United States as there is alleged to be in Section 5 of the Panama Act, which exempts American coastwise vessels from the payment of tolls and requires it of foreign vessels. No question of preferential treatment of American ships is involved in Section 11, since the canal is closed equally to all American and foreign railroad-owned and trust-controlled ships alike. Moreover, it might be argued that if the United States, while excluding its own ships for violating the Sherman Act, is bound to open the canal to foreign vessels found guilty of violating the same law, the effect will be to accord, not *equal* treatment to foreign vessels, which is all the treaty requires, but *preferential* treatment. But this argument rests upon the assumption that equality of treatment in respect to the use of the canal is all that the treaty guarantees. In fact, it guarantees more than that. It guarantees that the canal shall be *free and open* to the vessels of commerce and of war of all nations. To close the canal, therefore, to certain classes of foreign vessels, even though there is no discrimination or inequality of treatment, would be a violation of the treaty. Strict compliance with its provisions requires freedom of use as well as equality of treatment in respect to tolls, one quite as much as the other.

The question of the right of the United States under the treaty to exclude foreign vessels from the use of the canal was little discussed in the debates on the Panama Canal bill. The point was raised by Representative Cannon in the House on May 18, 1912, but was not dwelt upon at length. In the course of his remarks, Mr. Cannon stated that it would not be possible under the treaty to exclude vessels owned by Canadian railroads, but his contention was denied by Representative Knowland.<sup>13</sup> Mr. Stevens of Minnesota opposed the bill mainly for the reason that Section 11, as he understood it, was a violation of the treaty.<sup>14</sup> But most of those who participated in the

<sup>13</sup>*Congressional Record*, 62nd Cong., 2nd Sess., p. 6752.

<sup>14</sup>*Ibid.*, p. 6922.

debates apparently assumed otherwise. The question therefore is an open one—it is purely and simply a question of treaty interpretation, and, unless the provisions of the Canal Act which have given rise to the dispute are modified or repealed, the obligation of the United States to accept the proposal of the British Government to submit the controversy to arbitration is one which the Government of the United States cannot honorably refuse.

The CHAIRMAN. Before proceeding with the discussion of this paper and the last paper of last evening, we will proceed with the program of the morning. All of the speakers are present, and, therefore, it would seem that we should go immediately forward.

The first paper on the program for this morning is on the question "Is it necessary in international law that injury actually be suffered before a justiciable action arises?", which is to be read by Mr. Thomas Raeburn White, of the Philadelphia Bar.

#### IS IT NECESSARY IN INTERNATIONAL LAW THAT INJURY ACTUALLY BE SUFFERED BEFORE A JUSTICIABLE ACTION ARISES?

ADDRESS OF MR. THOMAS RAEBURN WHITE, *of the Philadelphia Bar.*

The expression "justiciable action" carries with it the idea of compulsion. An action is a proceeding in a court of justice. It implies that the plaintiff can compel the defendant to answer and obey the order of the court.

An action, however, in this sense can scarcely be said to exist in international law; there is no recognized court; there is no method of commencing an action by summoning the defendant; there can be no compulsion to answer. By "action" in international law, therefore, we mean something slightly different—the right of one nation to demand of another that a dispute be submitted to arbitration. The word "justiciable" presupposes a controversy capable of being, and proper to be, so submitted.

But how can one nation be said ever to have the right to *demand* that a controversy be submitted to arbitration? Clearly no demand can be enforced. But an action or right of action may be said to arise where the circumstances are such that the demand for arbitration would be supported by the united opinion of the civilized world, and

a refusal would meet with universal disapproval; in a sense the submission to arbitration in such case is obligatory.

The problem before us is to determine the limits, if that be possible, of the cases in which such demand would be supported by international public opinion, and whether it is an essential incident of such cases that injury shall have been suffered before the demand is made. There are some classes of cases in which a demand for arbitration would be generally recognized to be reasonable, and a refusal would be deemed unreasonable and as showing a disinclination to observe the rules which generally govern the action of states toward one another.

First, whenever a state has violated the standard of conduct generally accepted as regulating the relations of nations (the *modus vivendi*, as it has been called), and in so doing has inflicted injury upon another, the right of the injured party to demand reparation, and to have the amount thereof ascertained by a court of arbitration, is, I think, generally conceded. In such case the injury necessarily precedes the demand for arbitration.

The second class of cases is where there is a difference as to the interpretation or application of a treaty; but not in all such cases would a demand for arbitration be necessarily approved by universal opinion. In some instances the treaties so clearly relate to political questions affecting the sovereignty of nations that the questions at issue would be generally recognized as unsuitable for arbitration. But there are many cases of disputes over the interpretation or application of treaties which are generally conceded to be justiciable. For example, questions of a technical nature, not involving political considerations; treaties concerning such matters as extradition, copyright, the establishment of extraterritorial courts, the control and navigation of international waterways and, in general, boundary questions arising from treaty obscurities.

A third class of cases where a justiciable action may exist is where the two nations have by treaty agreed to submit to arbitration a class of disputes including the one in question.

But there are certain general principles which, in the present stage of development of international law, affect the decision in all the preceding cases. It may be said in general that a nation cannot be compelled by the force of public opinion to submit a dispute to arbitration, if its honor, its vital interests, or its independence are involved.

Moreover, it is conceded that ordinarily a political, as distinguished from a legal, question cannot be arbitrated, or at least a demand for arbitration may be refused.

A legal question is one where the rule or law applicable to the case is known in advance, and the only duty of the tribunal is to ascertain the facts and apply the law; if the law is uncertain or if honor, vital interests or independence are involved, the question is deemed to be political. In such case, as the matter now stands, no justiciable action can be said to arise.

But I apprehend, in view of the general subject of this meeting, it was expected there would be a more particular discussion of the question now pending over the Panama Canal Act, and whether a case for arbitration has as yet arisen in that instance.

First, is this a case for arbitration at all, postponing for the moment the question as to the infliction of injury? On this point there can be little doubt. By the Hay-Pauncefote Treaty certain definite rules were laid down which were to govern the control and regulation of the Panama Canal and the charges of traffic. The United States has by an act of legislature declared its interpretation of that treaty, and has placed in the hands of the Executive the power to do certain acts which it is claimed will unfavorably affect British shipping. The interpretation placed on the treaty by the Act of Congress is claimed by Great Britain to be erroneous. Even without reference to the treaty agreeing to arbitrate such disputes as this, it is clear that a question is presented purely technical in its nature, *i. e.*, do the Canal Act and the treaty conflict, and, if so, in what particulars? No new rule is to be laid down, no political question is involved; the matter is exclusively one of interpretation by the application of well-known rules of construction.

If it be contended that a political question is involved, because the result may be to restrict the United States in its control of its own territory, the answer is no such question will be involved in the arbitration. The treaty when properly interpreted will be the restraining power and must be obeyed of its own force, unless the United States then takes the position that she will not be bound by it. Until then no political question would exist. It is beyond the scope of this paper, and somewhat aside from its main purpose, to enter into the question whether, notwithstanding the above observations, the United States would be justified in refusing arbitration on the ground that



the question is one of domestic policy, or that vital interests are involved; or whether, even if in an ordinary case such refusal would be supported by world opinion, the United States, in view of its obligatory arbitration treaty and of its often expressed adherence to the doctrine of obligatory arbitration, could afford to assume such an attitude. I desire, however, to record my entire dissent from any such contention.

It is interesting to note in this connection, however, that in one of the very few instances where any effort has been made to point out what treaties are susceptible of arbitral interpretation, treaties concerning oceanic canals were expressly included. In the explanatory note annexed to the Russian Proposal of International Arbitration, submitted to the Peace Conference of 1899, it is said:

Among the treaties for the interpretation of which compulsory arbitration ought to be admitted fully and unconditionally we may cite first of all the extensive group of those having universal character, and which have constituted a system of international means for subserving interests which are likewise international. \* \* \*

At present all treaties coming within the following two subdivisions may be included within the category of treaties of a universal character which are susceptible of admitting compulsory arbitration:

1. Treaties concluded for the purpose of affording international protection to the great arteries of international communication, postal, telegraph, and railroad conventions, conventions for the protection of submarine cables, regulations for the purpose of preventing collisions of vessels on the high seas and conventions relating to navigation on international rivers and interoceanic canals.

Moreover, there is authority in international law for the proposition that canals, such as the Panama Canal and the Suez Canal, are to be considered as existing for the common benefit of mankind, and that one nation could not legally exclude other nations from the use thereof, even if it were the absolute owner of the territory through which the canal passes. In short, the proposition has been advanced by very high authority, and I believe it to be sustained by reason, and by the general acquiescence in the principles which have governed the management of the Suez Canal, that the nation enjoying the ownership of an interoceanic canal cannot lawfully discriminate in

favor even of itself as against others. The general rules for the conduct of the Suez Canal have been adopted for the Panama Canal, and while the only nations which are parties to the treaty adopting these rules are the United States and Great Britain, it is not to be overlooked that they are the two great nations which dominate the Western Hemisphere, and that the other nations doubtless assumed that their interests were sufficiently safeguarded by the guarantee that all nations would be treated equally. In short, it seems a reasonable proposition, as suggested by Professor Westlake, that the system adopted for the control of the Suez and Panama Canals "must be considered as the *modus vivendi* established for a class of cases, though a restricted one," and, therefore, any violation of that *modus vivendi* even by the nation which owns the canal necessarily gives rise to a justiciable action, irrespective of a treaty and irrespective of any political questions which might be alleged to be involved.

But it is said no injury has as yet been inflicted, and, therefore, no case for arbitration has yet arisen, and this is the question for discussion especially assigned to this paper.

First considering the question somewhat generally: What bearing upon the case has the fact that no injury has as yet been inflicted? Is there any fundamental reason why a justiciable action does not arise until after actual injury? Even in municipal law there are cases where an action may be begun before any injury has been suffered. An action for damages for the anticipatory breach of a contract, a bill to quiet the title to land, or to restrain the issuance of municipal bonds—are instances in which actions are recognized and enforced by municipal law, although no injury has as yet been suffered by the plaintiff. I know of no case in which there has been a breach of commonly accepted rules of conduct by one nation against another, involving only a legal and not a political question, in which there has been a demand for arbitration prior to the infliction of actual injury. But I conceive that there may be such cases, and there does not seem to be any adequate reason why the actual infliction of injury is an inseparable incident to the existence of such a claim.

But the suggestion may be made that, especially in cases involving the interpretation of treaties, the fact that no actual injury has been inflicted renders the question political; that in such case the demand for arbitration will be in an effort to restrain the action of a sovereign power, and, therefore, the question is political and no justiciable

action can arise. It may be conceded that in the present condition of international law such a question would be in measure at least political. If injury has actually been suffered, the offending nation could not meet the demand for redress by abrogating the treaty *nunc pro tunc*. But if no injury has been inflicted the whole question is still open—assuming the interpretation to be inimical to its interests, perhaps the defendant nation will claim the right to abrogate the treaty, and, therefore, a political question will be presented. But does it necessarily follow that the question is not justiciable? If all other elements of a justiciable action are present, does the fact that there is as yet no actual injury, and that the question is in a sense political, prevent an arbitral case from arising? No reason is perceived why it should, and, in answering this question, the reason for the growing recognition of cases for obligatory arbitration should be considered.

The opinion of organized society is rapidly reaching the point where it recognizes not only the wickedness, but the inadequacy, of war as a means of settling international disputes, and it is ready to accept such principles of international law to govern international conduct as will avoid that method of settling disputes in future. There can be no question that a rule which provides that a justiciable action does not arise until after the infliction of injury would not tend toward the prevention of war, but rather the contrary. The fact that the recognition of the right to demand the submission to arbitration of such a controversy, prior to the infliction of injury, would tend to avoid international conflict should have a controlling effect upon the settlement of this question.

In considering this matter reference should be made to the Final Acts of the Hague Conferences of 1899 and 1907. In Article 17 of the Convention for the Pacific Settlement of International Disputes, at the First Conference, which was repeated without change as the 39th Article of the same convention at the Second Conference, it is provided, referring to the submission of cases to the Permanent Court of Arbitration at The Hague:

The submission to arbitration is concluded for questions already existing or for questions which may arise eventually; it may embrace any dispute or only disputes of a certain category.

This language is very broad, and the announcement that *any* dispute may be submitted to arbitration is an indication of the opinion

of the world, expressed in the form of a convention, that political disputes are suitable for such submission even though it is not yet recognized that one nation has the right to demand of the other that they should be so submitted.

The treaty between Great Britain and the United States providing for the obligatory arbitration of certain controversies also admits, and thereby impliedly approves, the arbitration of some political questions. The language of the treaty is:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

The opening words of this paragraph contemplate the arbitration of differences of a legal nature, *or* relating to the interpretation of treaties. The expression "relating to the interpretation of treaties" is unlimited and might include cases of a political nature.

It will be instructive to discuss the pending Panama controversy as illustrative of this matter. To the request of the British Government that the dispute as to the interpretation of the treaty should be submitted to arbitration, the United States Government, through Secretary Knox, replied taking the position, *inter alia*, that so far as the request for arbitration was concerned a case had not yet presented itself where the United States was bound to make any direct response thereto; that no injury had been suffered by Great Britain, and that whether any injury was suffered in future would depend upon future action of the Executive, which neither nation was bound to anticipate. The Secretary continued:

Concerning this possible future injury, it is only necessary to say that in the absence of an allegation of actual or certainly impending injury there appears nothing upon which to base a sound complaint.

Although a little aside from the point now under discussion, it is proper to point out that it is not clear that no injury has as yet been

inflicted. The announcement by a solemn act of legislation of the interpretation placed upon the Hay-Pauncefote Treaty by the United States is in effect a declaration that discrimination can legally be made in favor of United States vessels. Although no vessels have yet passed through the canal and no discriminative rates have actually been imposed with consequent effect upon commerce, it cannot be said that no injury has been inflicted by this declaration of the interpretation of the treaty. Doubtless preparations are now being made in some quarters for the carrying of commerce through the canal, and the industries engaged in preparing for such commerce, either in the building of ships or in the arranging of other matters preliminary thereto, may be and probably have been unfavorably affected. It is by no means clear, therefore, that no injury has been suffered.

But passing this point and assuming that no injury has been inflicted, it is clear that a case is presented of a technical nature, relative to the interpretation of a treaty. It is possible, but scarcely reasonable, for the United States to take the position that the question may yet be settled by diplomacy, for it has acted through Congress and announced in an authoritative way the interpretation upon which it proposes to insist. The only reason, therefore, which can be urged in refusing arbitration is that the question is political, because no actual injury has been inflicted.

This brings us, therefore, to the real question underlying the whole controversy: Is there any fundamental reason why two independent nations should not submit a political dispute to the decision of an arbitral tribunal? Although, as has been stated, there are many treaties which admit of political disputes being submitted, it cannot be said that international law has as yet reached the point where the arbitral character of such disputes is generally recognized. But there is no reason why they should not be, provided at least they do not affect the honor, vital interests or the independence of nations, as the pending controversy clearly does not. Probably one reason why nations are disinclined to admit that political disputes can be settled by arbitration is because of the feeling that for a nation to be controlled in its future action is an impairment of its sovereignty, whereas a mere adjudication as to the amount which it owes for injury inflicted is not such impairment, being only a convenient method of ascertaining the amount of damage which the nation is willing to pay.

However, the fact that international law now recognizes, at least

tacitly, that there are cases where arbitration is in a sense obligatory is an admission that, even in cases of a legal nature, the element of compulsion does exist, although enforced only by public opinion. If the element of compulsion exists where there is a demand for injury inflicted, why should it not exist where there is a demand that threatened injury be restrained? There is no fundamental distinction between the two cases.

Municipal law develops by the advance of public opinion, which ultimately establishes rules of action, either through acts of legislation or through precedents made by the courts in decided cases. International law develops in the same way. International public opinion has, I think it may be said, already contemplated the decision of some political questions by arbitral tribunals, as indicated by the general language of treaties admitting of the decision of such disputes in that way. The Hague Conferences, through the conventions already referred to, analogous to acts of legislatures in states, have announced that arbitration is suitable for the decision of "*any* dispute", which includes *political* disputes. The next step would naturally be a precedent, which as yet does not exist. The occasion for such precedent has arisen. By making the request which it has done, Great Britain has in effect announced its adherence to the principle that a question concerning the interpretation of a treaty, political in the sense that no injury has been inflicted, can and should be submitted to arbitration in advance of such injury. This is of little value as a precedent, because it is to the interest of Great Britain that this position be assumed, but with the United States it is quite different. If it accedes to the demand of Great Britain, where its action will be contrary to its own interests, and agrees that a case for arbitration has arisen in a matter involving a political question, a precedent will be established of the utmost value, which will mark a distinct step in advance in the development of international law, and which will go far toward establishing the rule that the settlement of international controversies should, wherever possible, precede rather than follow the doing of acts likely to cause international friction. If such a principle becomes finally established it will undoubtedly promote the cause of international peace and good will.

In view of the long and honorable history of the United States as a leader in the movement for the substitution of a system of international judicature for the present unsatisfactory methods of set-

ting international disputes, it is particularly appropriate that the opportunity should have been offered it to establish such a precedent. It should go further than any other nation in yielding to any well-founded request that a dispute should be arbitrated. It would be unworthy of the United States to rely upon what must be deemed a technical reason for declining to arbitrate, and it is to be hoped that the State Department will not persist in the attitude which has been assumed, and will embrace the opportunity of creating a precedent sustaining the proposition that it is not necessary in international law that injury actually be suffered before a justiciable action arises.

The CHAIRMAN. Professor Westlake, who died on the 17th of April, and who was the mentor of the British Government in many of these affairs, sent, before he died, to the Secretary a letter upon this particular matter, which I will ask the Secretary to read:

Secretary SCOTT. Before reading the letter I should like to say that I asked this year a number of foreign publicists to be present and participate in the discussion, among others, naturally, Professor Westlake. In a personal letter, he regretted that his advanced age and precarious state of health would not permit him to come, but he took a great interest in the program, which was enclosed in the letter that I sent to him, especially in Question 7, and promised a brief memorandum. A few days after his letter of declination, I received the memorandum, which I now have the honor to read.

Under date of March 14, 1913, the distinguished publicist said:

Dear Professor Scott:

I now sit down to send you those observations on the "proposed subjects for discussion" at the forthcoming meeting of the American Society of International Law, which I promised you in my last.

The whole series of those subjects is full of the canal, which indeed has now an overmastering interest for all who are concerned about the rectitude of international conduct and the promotion of international arbitration. The most admirable speech of Mr. Elihu Root in the Senate, which he was so kind as to send me, enables me to feel assured that under his guidance the discussions in the Association will be thorough and sound. It is therefore only as to No. 7 in the list, which steps a little out from the line of the others, that I wish to say a few words.

The question—"Is it necessary in international law that injury be actually suffered before a justiciable action arises?"—seems equivalent to asking whether, in the present condition of international law, there are any means of bringing political claims to a quasi-judicial decision. Where there is an injury there is a legal claim, and arbitration is possible, but how about non-legal claims, that is political ones?

I hope that in discussing that question the Association will not lose sight of the fact that in the Convention for the Pacific Settlement of International Disputes, Art. 17 in the form of 1899, preserved unaltered as Art. 39 of 1907, runs thus (the italics mine):

The submission to arbitration (*convention d'arbitrage*) is concluded for questions already existing, or for questions which may arise eventually. It may embrace any dispute, or only disputes of a certain category.

Here is a provision which distinctly allows giving a justiciable character to at least *some* political questions, as will be seen by considering the present state of the coastwise question between Great Britain and the United States.

Great Britain, supposing her claim to be justified, will still have suffered no *injury* until and unless the coastwise exemption is applied in the working of the canal. In the meantime there is only an intention on the part of the United States, expressed in very solemn form by the Panama Canal law, but liable to be altered. But that intention may have a great effect on ship-building, and on the various other commercial and financial arrangements necessary in contemplation of the traffic through the canal. It is therefore important that the question should be decided as soon as may be, and the article which I have quoted from the Hague Convention admits it as a subject of arbitration, political rather than legal as it so far is, in the character of "a question which may arise eventually."

If the Association should go more at large into the *justiciableness* of political claims, it may perhaps find it necessary to consider the *justiciableness* of political claims. On that topic, which lies at the root of practical international relations, I cannot add to what I have said in Chapter XIII of my volume on *International Law, Part I, Peace*, 1904 and 1910. The title of the chapter is *The Political Action of States*.

Believe me to be yours ever sincerely,

(Signed) J. WESTLAKE.



Secretary SCOTT. I may be permitted, Mr. Chairman and gentlemen, merely to say, in conclusion, that the writer of this letter, who has since died, was one of the very few honorary members of the AMERICAN SOCIETY OF INTERNATIONAL LAW.

The CHAIRMAN. The question "What is the international obligation of the United States, if any, under its treaties, in view of the British contention?" is the next.

It will be presented first by Mr. Hannis Taylor, of the Bar of the Supreme Court of the United States, formerly Minister to Spain.

Mr. TAYLOR. Mr. Chairman, Ladies and Gentlemen: I have just heard with profound regret of the death of Professor Westlake, with whom I had for some years very pleasant relations. Not very long ago he was good enough to send me the last edition of his great work on International Law, which I have always near me. Next to Thomas Erskine Holland, I regard him as the clearest and most authoritative writer upon international law Great Britain has produced since the death of Hall.

### THE RULE OF TREATY CONSTRUCTION KNOWN AS *REBUS SIC STANTIBUS*.

ADDRESS OF HONORABLE HANNIS TAYLOR, *of the Bar of the Supreme Court of the United States, formerly American Minister to Spain.*

At the end of a century of peace between Great Britain and the United States we have a pending problem, whose solution is to test the strength of the so-called moral alliance now existing between the two grand divisions of English-speaking peoples. That moral alliance made a tremendous advance after Lord Salisbury was wise enough to accept, in 1895, our supreme arbitrating power in the New World as asserted by President Cleveland and Mr. Olney in the Venezuelan boundary controversy. Great Britain simply enlarged that policy of conciliation when in 1901 she practically abrogated the Clayton-Bulwer Treaty with the avowed purpose of advancing the construction of a ship canal "by whatever route may be considered expedient." Great Britain really had nothing to give up in abrogating that treaty which, as a whole, rested upon the assumption that Europe was to have an

interest in the canal because European capitalists were to build it. The fact that not one dollar of European money was ever invested in the enterprise, deprived the basic idea of the transaction of its *raison d'être*. As Great Britain's claim of a protectorate over the Mosquito Indians in Nicaragua was in open defiance of the Monroe Doctrine, and without legal or moral foundation, her case can draw no strength from that source.

Is that statement justifiable? In a notable speech made in the Senate of the United States on January 21, 1913, the Honorable Elihu Root said Great Britain had "a protectorate over the Mosquito coast, a great stretch of territory upon the eastern shore of Central America which included the river San Juan and the valley and harbor of San Juan de Nicaragua, or Greytown. All men's minds then were concentrated upon the Nicaragua Canal route, as they were until after the treaty of 1901 was made. \* \* \* Great Britain did surrender her rights to the Mosquito coast, so that the position of the United States and Great Britain became a position of absolute equality." Against that statement, in which Senator Root has made a forceful summary of all that can possibly be said in favor of the British claim, I desire to set some extracts from a remarkably calm and lucid monograph entitled *Great Britain and the Panama Canal*, published on April 10, 1913, at Heidelberg, by George C. Butte, who says "the writer has endeavored to consider all questions from an objective standpoint—'sachlich,' as the Germans expressively say. This has been made the more possible, because the writer, being in a 'neutral' land, has at least remained uninfluenced by local sentiment." This manifestly impartial writer, after describing the treaty of December 12, 1846, with Colombia (which he declares was "a defensive alliance directed against the only Power that was at that time hovering about these coasts"), says: "Following the treaty of 1846 relating to the Panama route, agents of the United States were active also in negotiating with the Government of Nicaragua for the control of the Nicaragua route (the Hise-Selva convention of June 21, 1849, and the Squier-Zepeda general treaty of September 3, 1849). To offset this diplomatic advantage, Great Britain was seizing territory on one pretext or another along the Mosquito coast and in Belize and threatening to take the port of San Juan de Nicaragua (Greytown) in order to get the strategic control over the proposed interoceanic highway by way of Lake Nicaragua. The control of this canal route, important as it was thought

to be to the welfare and safety of the United States, was apparently to be won only at the cost of another vital national policy, namely, that the Western Hemisphere should not be made a field of future colonization by European Powers." Will any one attempt to deny that that is a perfectly fair statement of the conditions under which Great Britain, in open defiance of the Monroe Doctrine, was "seizing territory on one pretext or another along the Mosquito coast and in Belize and threatening to take the port of San Juan de Nicaragua (Greytown) in order to get the strategic control over the proposed interoceanic highway by way of Lake Nicaragua." Whatever moral equity vested in Great Britain under the terms of the Clayton-Bulwer Treaty, rested upon that basis alone.

After reaching that conclusion, Mr. Butte says:

Just how much of the Clayton-Bulwer Treaty, if any, was in force at the time it was superseded in 1901, and what fragments of it, if any, had any practical application to the radically changed conditions, is one of the riddles of diplomacy which some modern *Œdipus* may solve. We shall in a subsequent paragraph hazard an opinion as to the meaning of the reference in the preamble of the Hay-Pauncefote Treaty to Article VIII of the Clayton-Bulwer Treaty. \* \* \* No more fundamental error is committed generally by those defending the British view in the present controversy than appears in the following statement of the government's protest. "The Hay-Pauncefote Treaty does not stand alone. It was the corollary of the Clayton-Bulwer Treaty of 1850." The Hay-Pauncefote Treaty contains five articles and the very first article unconditionally abrogates the treaty of 1850. Article I: "The High Contracting Parties agree that the present treaty shall supersede the aforementioned convention of the 19th of April, 1850." It would be difficult to say any more clearly that the parties intended to give that maimed and decrepit instrument a decent burial. \* \* \* It is unreasonable to advance claims which magnify the relation and enlarge the rights of Great Britain beyond those she would have had if the canal had been constructed in 1850. In 1901, the British Government itself declared that it had no intention then of giving "to Article VIII of the Clayton-Bulwer Treaty a wider application than it originally possessed." \* \* \* The Clayton-Bulwer Treaty, it should be emphasized, was never at any time in effect as to any canal route but the Nicaragua route. Before 1901, the United States was entirely free to build an isthmian canal without consulting Great Britain, by any one of the other eighteen different routes that had been surveyed and declared feasible. By virtue of her treaty of 1846

with New Granada, she was directly and solely charged with the protection of the Panama route. Great Britain was well aware of these facts. They gave her concern. \* \* \*

We believe the meaning of the Hay-Pauncefote Treaty can be found within the four corners of the treaty itself. "To go elsewhere in search of conjectures, is to endeavor to elude it." From the standpoint of abstract justice, the pretension of Great Britain that she should be put on the same footing as respects the use and enjoyment of the Panama Canal as the United States seems presumptuous. The restriction which she invokes against the sovereign right of the United States to enact legislation affecting its internal affairs, must appear in express language in the Hay-Pauncefote Treaty. No mere implication or argumentative deduction will suffice. And if we adopt the rule Lord Clarendon applied against the United States in construing the Clayton-Bulwer Treaty in the case of the Mosquito Indians, to the effect that "the true construction of a treaty must be deduced from the literal meaning of the words employed in the framing," it will be hard indeed for Great Britain to prove her claims.

And yet far be it from me to belittle Great Britain's good and wise motives in doing all she could to advance the building of an inter-oceanic canal. The interests of civilization demanded it; the interests of the moral alliance between Great Britain and the United States demanded it; and she was sincerely anxious to advance both. Let us never forget that through the canal at Panama the fleets of Great Britain and the United States are to unite as a great police force for the preservation of the peace of the world. It is not a good time to quarrel just at the moment when we are about to join hands in such an undertaking. And here it may be well to remember that we have already made a bad beginning. Through a restless and unnecessary impatience we committed an unparalleled act of international violence in taking away the Canal Zone from Colombia. Despite the treaty of 1846, wherein we solemnly guaranteed her sovereignty over the isthmus, we ended that sovereignty through a transaction which has, I fear, shocked the sensibilities of the world. Does it not, therefore, behoove us to be calm, discreet, fair-minded in dealing with the second great question of international law and diplomacy which the building of the canal has presented for solution?

Every one who has had any diplomatic experience knows that a great deal depends upon the form in which a question of international law or diplomacy is stated. In one form it will arouse every possible

antagonism; in another it will draw all minds towards conciliation. Nothing could be more unfortunate, more untactful, than the form in which the question of canal tolls is now pending. A large body of our citizens, if not a majority of them, believe that the regulation of tolls in a canal built with \$400,000,000 of our money (without a single foreign contribution) through our own territory is purely a domestic question with which foreign nations have nothing to do whatever. Upon that theory the Congress of the United States has acted already; it has disposed of the question upon that basis. When, under those circumstances, Downing Street demands the repeal of that Act of Congress, no matter how respectful the terms of the demand may be, a large body of our people, probably a majority, are up in arms against what they denounce as an insolent attempt at foreign dictation. Under such conditions I feel sure that the Act in question can not be repealed. If it could be, through the driving force of the party to which I belong, I believe it would wreck its future. The need of the hour is to suspend the menacing and probably hopeless contest in Congress for the repeal of the Act to which Great Britain objects, until diplomacy can find a path leading to compromise and conciliation.

As treaties stand upon a basis of their own, entirely apart from private contracts, the law of nations has always recognized the fact that all such agreements are necessarily made subject to the general understanding that they shall cease to be obligatory so soon as the conditions upon which they were executed are essentially altered. The principle that all treaties are concluded upon the tacit condition, *rebus sic stantibus*, clearly recognized by Grotius (Chap. XVI, s. XXV, *et seq.*) and Vattel (Book 2, c. 13, s. 200) has been denied by no modern authority. Hall, the greatest of the recent English publicists, whose book is the *vade mecum* of the British Foreign Office, declares in his work on *International Law*, s. 116, that neither party to a treaty "can make its binding effect dependent at will upon conditions other than those contemplated at the moment when the contract was entered into; and, on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered." Mr. Oppenheim, now professor of international law in the University of Cambridge, has, in his great work, Vol. I, p. 550, sec. 539, said: "It is an almost universally recognized fact that vital changes of circumstances may

be of such a kind as to justify a party in notifying an unnotifiable treaty. The vast majority of publicists, as well as all the governments of the members of the family of nations, agree, that all treaties are concluded under the tacit condition *rebus sic stantibus*." In my own work on *International Public Law*, s. 394, I have stated the matter in this way: "So unstable are the conditions of international existence, and so difficult is it to enforce a contract between states after the state of facts upon which it was founded has substantially changed, that all such agreements are necessarily made subject to the general understanding that they shall cease to be obligatory so soon as the conditions upon which they were executed are essentially altered." Having thus restated the rule, it was not strange, perhaps, that I should have been the first to apply it to the construction of the Hay-Pauncefote Treaty of 1901, which contemplated the building of an interoceanic canal by the United States in foreign territory. It seems to me that a radical breach of the tacit condition, *rebus sic stantibus*, occurred when in November, 1903, the Canal Zone became, by purchase, the domestic territory of the United States. It is hard to deny that by that event the tacit condition, *rebus sic stantibus*, was broken. And yet the subject is a delicate one,—it should be approached with great calmness, great caution. The existence of the rule, *rebus sic stantibus*, as applied to the construction of treaties, has never been denied, so far as I know, and it is not at all likely that Great Britain will deny its existence in the present instance.

On the other hand, controversy is almost sure to arise as to its application to the facts of a particular case, whenever it is invoked. As it will always be possible to invent some specious reason for invoking the rule in any case in which a treaty is at all ancient, the burden should always be cast upon the party who sets it up to demonstrate clearly that the state of facts upon which the treaty was founded has been "essentially altered."

All of the contemporaneous evidence demonstrates beyond any doubt whatever that no one contemplated the possibility of the United States acquiring the territory through which the canal was to be built when on November 18, 1901, the Hay-Pauncefote Treaty was concluded. Just two years thereafter, on November 18, 1903, Mr. Bunau Varilla, the accredited representative of Panama, signed with Secretary Hay the so-called Treaty of Panama, which was duly ratified. By its terms it granted to the United States in perpetuity a zone of

land and land under water for the construction, operation, maintenance, protection and sanitation of the canal, of the width of ten miles, beginning in the Caribbean Sea and extending to and across the Isthmus of Panama into the Pacific Ocean, excepting the cities of Colon and Panama. The treaty grants to the United States "all the rights, power and authority within the zone mentioned \* \* \* which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority." Great Britain's recognition of the present situation has been thus expressed: but "now that the United States has become the practical sovereign of the canal His Majesty's Government do not question its title to exercise belligerent rights for its protection." In order to protect the condition of things fixed by the Hay-Pauncefote Treaty, *from disturbance from any revolution that might occur in any of the countries which the canal was to traverse*, it was provided in the treaty "that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

No serious person will ever attempt so to distort these plain and explicit terms as to make it appear that they were intended to cover the then entirely unforeseen acquisition of the territory now known as the Canal Zone, by the United States. In the first place, the explicit terms used exclude such an idea. The terms of the treaty fix the fact that the "change of territorial sovereignty" referred to was such change as might take place in "*the country or countries traversed by the before-mentioned canal*." As the country or countries to be traversed were thousands of miles from the limits of the United States, there can be no possible doubt, no possible ambiguity as to the meaning intended. The clause was naturally inserted to guard the treaty against impairment by the not infrequent revolutionary changes that periodically occur in Latin America,—it had no possible reference to the acquisition of sovereignty by the United States, a contingency of which no one then dreamed.

Mr. Butte opens the monograph, heretofore quoted, with this statement: "He deceives himself grievously who believes the United States made the stupendous sacrifice of human energy and public money

necessary to build the Panama Canal, 'the greatest liberty man has ever taken with nature,' with any other purpose in view than the national advantage of the United States—commercial and, above all, political advantage." Through our own unaided efforts, and the expenditure of \$400,000,000 of our own money, we are about to realize the dream of centuries,—a dream in which Goethe indulged as early as 1827, wishing at the same time that his life might be prolonged fifty years so that he could see it realized. What candid mind is willing to declare that the conditions under which we are now completing this great enterprise, at our own expense, through territory as completely our own as the District of Columbia, are not "essentially" different from the conditions existing in 1901, when we undertook to build the canal *through foreign territory*? Who can believe that if we were concluding the Hay-Pauncefote Treaty today, we would make any stipulation with a foreign Power, not contributing one cent to the enterprise, to the effect that we shall not exercise the sovereign right to legislate as to our own property and our own citizens within our own territory, without the consent of that foreign Power,—especially when we remember that the Clayton-Bulwer Treaty was never in effect as to any route but the Nicaragua route?

The conclusion is irresistible that by the radical changes wrought in conditions existing at the time the Hay-Pauncefote Treaty was made, through the subsequent purchase of the Canal Zone by the United States, the treaty as a whole became *voidable*. Or, to use the words of Professor Oppenheim, the vital change wrought by the subsequent purchase of the Canal Zone, rendered an otherwise "un-notifiable treaty" *notifiable*. Under the universally accepted rule of *rebus sic stantibus*, so luminously expounded by the greatest of the recent English publicists, we have the right and Great Britain has the right to call a diplomatic conference in order to make such modifications in the terms of this voidable or "notifiable" treaty as either party may desire. We may admit, if we see fit, for the sake of the argument at least, that the expression "all nations" in Article 3 of the treaty was originally intended to include the United States. If it did, we now have a perfect right, under the rule of *rebus sic stantibus*, to demand a modification as the treaty, as a whole, has become voidable, or "notifiable," because the conditions upon which it was executed have been "essentially altered" through subsequent events. There is not the slightest danger of the British Foreign Office denying



that universally admitted rule for the construction of treaties, first, because Great Britain is estopped by the expositions of her own publicists; second, because she is estopped by her diplomatic action in conceding the principle to Russia when in 1870 that country claimed the right to be released, through subsequent events, from some of the vital provisions of the Treaty of Paris relating to the Black Sea. Let us then transfer this controversy at once from the halls of Congress to the cabinets of diplomacy, where it can be dealt with dispassionately and tactfully, with an honest desire to reach a conclusion just and honorable to both nations. After many years of effort to expound, as one unbroken story, the constitutional and political history of the English people on both sides of the Atlantic, I am as devoted as any American citizen can be to the maintenance of that great moral alliance upon which depends, to so great an extent, the future peace of the world. That moral alliance, so strong in recent years, may be materially weakened in the near future by bungling mismanagement. For the moment we have the cart before the horse. Let diplomacy first suggest such modifications in existing legislation as may be necessary to carry out the result which diplomacy may reach.

Above all let us prevent at this time a debate in the two houses of the American Congress whose only fruit will be bitterness and recrimination. Mr. Butte, writing in a "neutral" land, with his mind "uninfluenced by local sentiment," has said:

Four solutions of the controversy may be considered:

(1) Diplomatic negotiations which may lead to mutual concessions and an amicable settlement; (2) arbitration before the Permanent Court of Arbitration at The Hague; (3) arbitration before a commission or court composed solely of American and British subjects; (4) submission of the controverted questions to the Supreme Court of the United States. The first appears to the writer to offer the best hope of a settlement.

I believe that under existing conditions, "diplomatic negotiations" offer *the only hope of a settlement*,—of such a settlement as every one true to the existing moral alliance between Great Britain and the United States should strive to bring about.

The CHAIRMAN. Professor Amos S. Hershey, Professor of Political Science and International Law in Indiana University, will present the question from the negative point of view.

WHAT IS THE INTERNATIONAL OBLIGATION OF THE UNITED STATES, IF ANY, UNDER ITS TREATIES, IN VIEW OF THE BRITISH CONTENTION?

ADDRESS OF MR. AMOS S. HERSHEY, *Professor of Political Science and International Law in Indiana University.*

I find myself in a somewhat embarrassing situation. I fear that my answer to the question under discussion will take you over ground with which you are already familiar, so that you may feel that I have contributed nothing of novelty or essential importance to the discussion.

My reply in brief is this: Unless Congress sees fit to repeal that portion of the Panama Canal Act which exempts coastwise traffic from the payment of tolls, the United States is under an undoubted international obligation to enter into an agreement with Great Britain to arbitrate the controversy.

It may be that the United States is under the alternative international obligation of repealing the section of the Panama Canal Act referred to above, in accordance with Rule 1 of Article III of the Hay-Pauncefote Treaty, which provides:

The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that *there shall be no discrimination against any such nation*, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

In respect to the proper interpretation of this rule, I am unfortunately in the position of a judge who has been so favorably (in some cases unfavorably) impressed with the arguments on both sides that he finds it difficult to render a decision. Besides, this question was so fully and ably treated yesterday that I feel certain I shall be readily excused from a further discussion.

However this may be, there is one international obligation resting upon the United States in the premises which scarcely admits of a reasonable doubt. This obligation is both legal and moral.

Article I of the convention between Great Britain and the United States, signed April 4, 1908, declares:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

This treaty constitutes an undoubted legal obligation. It is a solemn compact between two great nations, and is as binding in law as are valid contracts between private individuals or corporations.

It cannot be successfully maintained that the Panama Canal tolls controversy falls within the scope of any of the above-named exceptions to the application of the Anglo-American arbitration treaty. Certainly the difference is not one affecting the "independence" or the "honor" of either state. Such a contention would be too absurd for serious argument. Nor will it be very seriously maintained that the difference is one affecting our "vital interests," whatever meaning may be given to this somewhat vague and apparently indefinable phrase. The phrase "vital interests" of course refers to questions of a far-reaching political, economic, or social nature. It might be justly held to apply to great issues involving considerations of such a national policy as the Monroe Doctrine or to fundamental economic and racial issues, such as were involved in the causes which led to the Anglo-Boer, Spanish-American, and Russo-Japanese Wars. But no proper construction of the phrase could possibly render it applicable to a question of exempting from tolls our coastwise trade.

Upon a first and superficial glance, it may seem as though this Panama tolls controversy falls under another exception to the application of the Anglo-American arbitration treaty. It may appear to be a difference which "concerns the interests of third parties." But a little reflection will lead to the conclusion that, while the interests of third states are doubtless affected in the sense that they may enjoy certain advantages or suffer certain losses in consequence of a decision favorable or unfavorable to Great Britain (as the case may be), their interests or rights are not directly concerned in the dispute itself. They are not parties to the suit.

Inasmuch as the arbitration treaty in question was only concluded for a period of five years from date of the exchange of ratifications,

it has been suggested that the United States may avoid her obligations, if any, to Great Britain by refusing to renew the convention upon its expiration in June, 1913. Even supposing the United States Government were willing to fly in the face of public sentiment and attempt to evade the issue in this disgraceful manner, it would probably be in vain; for the controversy would be regarded as having arisen prior to the expiration of the treaty, and the United States has agreed to arbitrate *existing* differences, *i. e.*, existing under the treaty, or while the treaty was still in force.

It has also been suggested that the Hay-Pauncefote Treaty is void or voidable on the ground that there has been a vital change of conditions since the treaty was made, the clause *rebus sic stantibus* being an implied condition in all treaties. This view, which assumes that a mere change in title-deed or transfer of territory constitutes a vital change of circumstances, appears to me trivial and therefore unworthy of serious refutation. Besides, this contingency was expressly provided for in Article IV of the treaty, which declares:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

Having demonstrated, as I think, that the obligation to arbitrate the Panama Canal tolls controversy is a legal one, it remains to show that it constitutes a moral obligation as well. In so doing I shall take the liberty of drawing still more largely than I have hitherto done upon a pamphlet of mine recently published by the American Association for International Conciliation.

The United States has been the consistent champion of international arbitration ever since this ancient practice was revived in modern times by the Jay Treaty of 1794. Among the many arbitrations to which this country has been a party, might be indicated various important boundary disputes, the Alabama Claims and Bering Sea controversies, and the Northwestern Fishery question (the latter involving an interpretation of Article I of the Treaty of 1898). As Professor Hyde has well said:

The experience of the United States affords abundant evidence of the fact that if an international controversy is of a legal character, it is capable of adjustment by arbitration whether the claims involved are national or private; whether the issue is one of fact or of law; whether the difference is one concerning the ownership of land or the control of water; whether the honor of the state is involved, or even its most vital interests.<sup>1</sup>

At the First Hague Conference of 1899 the United States was particularly active in urging arbitration and assisting in the creation of the so-called Permanent Court of Arbitration at The Hague. Our government subscribed to the following declaration contained in the arbitration convention adopted at The Hague:

In questions of a legal nature, and *especially in the interpretation or application of international conventions*, arbitration is recognized by the signatory Powers as the most effective, and at the same time the most equitable means of settling disputes, which diplomacy has failed to settle.

At the Second Hague Conference in 1907 the United States was one of the most vigorous advocates of a scheme for obligatory arbitration, and the American delegation proposed a project for a Court of Arbitral Justice which, if adopted, would have transformed the Hague Tribunal, or so-called Court of Permanent Arbitration created in 1899, into a real permanent High Court of International Justice, or Supreme Court of the Nations. Both schemes failed of adoption, but the contracting Powers represented at The Hague declared themselves "unanimous:" (1) In admitting the principle of obligatory arbitration; (2) In declaring that certain disputes, in *particular those relating to the interpretation and application of the provisions of international agreements*, may be submitted to obligatory arbitration without restriction. It is to be hoped that a convention providing for the establishment of a system of real international justice will be agreed upon at the Third Hague Peace Conference.

However, authorities on international law may differ in their views as to the possible scope of arbitration as applied to the settlement of international disputes, there appears to be a consensus of opinion

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<sup>1</sup>Hyde, in *2 Proceedings of the Second National Peace Congress*. (1909), p. 232.

among them that interpretation of treaties is a proper subject for judicial determination. The rules for such interpretation are derived from general jurisprudence, and there is general agreement among the authorities as to the more important of these rules.

The method of interpretation consists in finding out the connection made by the parties to an agreement between the terms of their contract and the objects to which it is to be applied. This involves two steps. One is to ascertain what has been called the "standard of interpretation"; that is, the sense in which the various terms are employed. The other is to learn what are the sources of interpretation; that is, to find out where one may turn for evidence of that sense."<sup>2</sup>

The main purpose of interpretation is to determine the real intentions of the parties. To this end diplomatic correspondence, or interchange and expression of views leading up to the final negotiation and ratification of the treaty, would be all important. For instance, the fact that an amendment was lost in the Senate providing that the United States should reserve the right to determine in respect to charges in favor of our own citizens, would not be decisive in itself. All the circumstances leading up to this vote would have to be taken into account. Besides, there are many other conditions surrounding the case, which would have to be considered, such, for example, as the bearing of the Clayton-Bulwer Treaty upon the Hay-Pauncefote Treaty, more particularly whether the latter treaty was the main consideration for the abrogation of the former, as, indeed, appears to have been the case.

It has been maintained that there are practical difficulties in the way of a just and impartial arbitration of this question, arising either from defects inherent in the arbitral system or from the alleged impossibility of finding judges who do not belong to interested nations.

It may be admitted that so-called courts or commissions of arbitration too often, in the past, have sought a solution of the controversy submitted to them by way of compromise, rather than through the application of legal principles to the case in hand. But in the administration of international justice during recent years great progress has been made in the direction of substituting better methods, higher

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<sup>2</sup>Hyde, in 3 *American Journal of Int. Law* (1910), p. 46.

ideals, and more carefully selected judges for mixed commissions and occasional tribunals. Arbitral decisions are coming more and more to represent the application of principles of law and equity by trained jurists working in a judicial spirit instead of by arbiters animated by a mere desire to compromise the issue. In a word, in the settlement of international differences, more advanced judicial methods and a better judicial organization are taking the place of the older system of haphazard, compromising arbitration.

The defects in the arbitral system of the past have been due mainly to a want of care in the selection of judges, or to the lack of a carefully drafted agreement clearly defining the questions at issue and the rules of procedure to be observed. But none of these defects are beyond remedy, and the Hague Conferences of 1899 and 1907 have furnished us not merely with a better method of selecting judges than was previously in vogue, but also with an elaborate code of arbitral procedure which should prove adequate in most cases.

As to the alleged impossibility of finding fair and impartial judges to settle this particular disagreement, it may again be admitted that the difficulty is a real one. But we are here dealing with a difficulty—not an impossibility. It is true that all the maritime Powers of the world (including those of South America) are in a sense interested in the decision of this case. It has been suggested that "Switzerland is perhaps the only country capable of furnishing international jurists of high standing, who would probably be free from all pressure of selfish public opinion when acting as judges of the case."<sup>3</sup>

Switzerland could undoubtedly furnish them. So could many other countries, including Great Britain and the United States. In a tribunal composed wholly of arbitrators selected by the interested governments for the settlement of the Alaskan boundary dispute (1903), Lord Alverstone, the president of the tribunal, sustained the contention of the United States that it should continue to enjoy a continuous strip of mainland separating the British territory from the inlets of the sea. In nearly all countries of the civilized world there are today international jurists who, whether engaged in the practice of law at the bar, administering it on the bench, or holding chairs in our universities and law schools, possess the requisite knowledge, courage, and judicial spirit to declare and administer the law applicable to this and similar

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<sup>3</sup>*The Outlook* for December 7, 1912.

differences of a legal nature. The time has, indeed, passed when it can be seriously maintained that such disputes are incapable of judicial solution. Least of all can the United States afford to refuse to settle such a controversy whether by arbitral or judicial methods.

The CHAIRMAN. Yesterday morning the discussion was quite comparable with the atmosphere. We trust that the whole question now before us may be open and that we may have some of the warmth of yesterday's discussion in the discussion of this morning. The question is open for discussion.

Mr. EDMUND F. TRABUE. Mr. Chairman, coming from the Ohio Valley, State of Kentucky, international law with us is almost academic. Nevertheless, we notice what is going on in Congress, and we cannot understand why a million dollars a year of our money should be given away for the purpose of teaching Great Britain that we are going to attend to our own affairs in our own way.

Now, taking up very briefly the points which have been raised.

Mr. Oppenheim, to whom Mr. Taylor has referred, has just published a little work upon the subject of these canal tolls, and has taken the position that we have no right to exempt the coastwise trade of the United States from the payment of such tolls, which neutralizes the authority of Mr. Oppenheim on the point for which he was cited by Mr. Taylor; but assuming that Mr. Oppenheim is wrong in claiming that the exemption of the coastwise tolls would raise the tolls to be paid by the other nations, and assuming, based upon Mr. Emory Johnson's statistics, that the tolls of other nations will not be raised, is it a sufficient answer to Great Britain, and more especially is it a sufficient answer to the people of the United States, who do not desire their money given away at such a rate, to say that because we may grant a bounty to any traffic, therefore we may exempt that traffic from tolls? Would not that argument be as applicable to the coastwise traffic of Peru, or Chile, or Brazil, or Argentina, if we should feel that it were to our benefit and our advantage to grant a bounty to the traffic of such countries? Could any foreign country claim that we have not the right to grant a bounty to such traffic; and would it follow that, because we had a right to grant a bounty to such traffic, therefore we might exempt that traffic from the payment of tolls? If so, where would the argument end, and what would become of the provision in our treaty for neutralization?



Responsive to Mr. Hannis Taylor's canon of treaty construction, that change of territorial dominion gives us a right to abrogate the Hay-Pauncefote Treaty, notwithstanding that treaty expressly provides the contrary, because our purchase of the zone was not contemplated when the treaty was made, it is obviously untenable, as would instantly appear if such a canon of construction were applied to the commerce clause in the Federal Constitution, for it would prevent the application of that clause to railroads, to the telegraph, the telephone, and the wireless, for none of these was within the contemplation of the framers of the Constitution.

We have heard here of the history of this treaty; that the Clayton-Bulwer Treaty was sought by the United States and not by Great Britain; then that it was modified upon the request of the United States, which sought the Hay-Pauncefote Treaty; that these treaties were simply the results of negotiations begun long previously, as far back as 1835 and even probably originating with the letter of Mr. Clay in 1826, with the representation throughout that the United States did not seek a selfish advantage to itself, but that the canal should belong equally to all the nations in the world.

Now, why shall we, at this day, when the whole world has taken us at our word, when we are accomplishing nothing by it except giving away a million dollars a year, go back upon our assurances for all past time? If we have a foot to stand on, we can certainly show it to a court of arbitration, and, as has been so well said here, this is not an occasion for the United States to depart from its traditional policy of arbitration.

The CHAIRMAN. Is there anyone else who desires to be heard?

Mr. EMORY R. JOHNSON. I do not wish to participate in this debate for a number of sufficient reasons, but I wish simply to correct a misapprehension. I have not said that the statistics of traffic and possible revenue indicate that the tolls should not be higher upon foreign shipping as a result of the exemption of the coastwise traffic; nor am I able to interpret my statistics as showing that the foreign shipments might not be charged higher tolls if American ships do not pay tolls.

Mr. TRABUE. I simply misunderstood Mr. Johnson, and I am glad to be corrected; but his statement just made further enforces my

proposition that with Great Britain, as with all other nations, competition is most important; so, regardless of the question of the size of the tolls, Great Britain and all other countries have that interest in the equality of tolls.

Professor N. DWIGHT HARRIS. It would be impossible to answer in a few moments the able arguments in at least two of the papers that have been read this morning. I think some of them are almost unanswerable; but there are just one or two points that occur to me, on which it might be interesting to speak, in the way of condensing our thought on what has been said.

Anyone who has read the debates in Congress and in the Senate concerning this Canal Bill, and particularly those on the amendment to the bill, which, by the way, came from the minority report and not from the majority, knows that the question was settled not at all from the standpoint of international law, and not at all from the standpoint of what might be a dignified attitude for the United States opening the canal to the interests and commerce of the world to pursue, but from the entirely selfish standpoint of what the people of the United States, at least assuming that Congress and the Senate of the United States represented the people of the United States at that time, felt that they wanted to do with their own canal. They proposed to do as they pleased concerning the use of the canal by United States vessels, and to interpret the treaty as best suited their own purposes.

Now, it was very unfortunate that Congress attempted to lay down a policy itself in this way. It hampered the State Department, which had not reached the point in their discussions with Great Britain as to know exactly where they were coming out, as we might say. But when Congress went to work and passed an amendment giving free passage of the canal to all vessels engaged in our coastwise trade, it embarrassed the State Department and put it in a very difficult position.

It seems to me that if Congress was reasonable in this matter and wished to put the United States in a position where it could handle the matter in the most diplomatic and most advisable way, a way which would redound to the interests of the United States as well as to the interests of international law, Congress should annul that amendment, so that the United States Government could have a free hand. I should like very much to see this done; and then, having a free hand,

it would be quite possible for the United States Government to take up the argument again with Great Britain in a very courteous and direct way, and to reach a satisfactory understanding upon the points in question, at least as far as it is possible to do so through the channel of diplomacy.

Now comes that very valuable suggestion which was made here today, and which was also made by that distinguished writer on international law—Mr. Westlake—that it is possible to arbitrate even a political question. It would, therefore, seem to be within the possibilities for the United States to submit to arbitration (if it appeared desirable, and a wise thing to do) the treaty some of the terms of which seem to be in doubt, or the interpretation of which it may not be possible for the two countries to come to a definite agreement upon.

So I think that, if we would let the State Department have an opportunity to work this problem out in a fairly scientific way, from the standpoint of international law, it would be possible for the whole thing to be amicably and legally and satisfactorily settled.

I thank you.

General PETER C. HAINS. Mr. Chairman and Gentlemen: I am a layman, but I have been very much interested in the discussion that has been going on here for the last two days in respect to the Panama Canal. It was my fortune to be on the original commission that recommended the Panama Canal route as the best one on which the United States should construct its canal. Subsequently, I was on the second commission, known as the "Constructing Commission," and did a little work, I hope, towards the prevention of the adoption of a sea level canal and the adoption of a lock-canal like the one they are now constructing.

At that time, I had occasion to look into the law as laid down by the Hay-Pauncefote Treaty, and I noticed that the word "neutralization" occurs three times in that treaty. Being a layman, I was anxious to find out just exactly what "neutralization" meant. I found on examining authorities—I do not know whether I was accurate or not in my finding—that a neutralized canal was the very reverse of neutralized territory. It was a canal that was free and open to all, and one which had no fortifications commanding the entrance. It seems to me that that is what "neutralization" meant at that time. I do not lose

sight of the fact that when the Suez Canal was neutralized by the Convention of Constantinople fortifications were forbidden, but "neutralization," according to the authorities, it seemed to me, meant a canal that had no fortifications to command it. Now, we are constructing fortifications there. Has the word "neutralization" reached a different meaning today from what it formerly had? If it has, when did it get that new meaning? The word "neutralization" is a comparatively modern word; but I would like to ask if there are any members of this Society who can tell me what "neutralization" means in the Hay-Pauncefote Treaty as it stands today, or is it true, as some claim, that the canal is not neutralized at all?

I just wanted to ask that question, that is all.

The CHAIRMAN. Can someone answer General Hains' question? Can you do so, Mr. Kennedy?

Mr. CRAMMOND KENNEDY. Mr. Chairman, I do not exactly see why you should ask me to answer it, but I will try to do it in a very few words.

The CHAIRMAN. The question is, What does the word "neutralization" mean? Perhaps, after Mr. Kennedy answers it, somebody else will desire also to give an answer.

Mr. CRAMMOND KENNEDY. To begin with, Mr. Chairman and gentlemen, I do not think, from the authoritative definitions of "neutralization," that the Panama Canal can be said to be neutralized in the true sense of the term. Let me read you, from the January number of our Society's *Journal*, a definition of neutralization by one of our most distinguished publicists, Dr. Thomas J. Lawrence:

In ordinary neutrality are involved the two elements of abstention from taking part in an existing war and freedom to engage in it or not at pleasure. In neutralization the first element remains the same; but, instead of the second, there is imposed by international law either an obligation not to fight except in the strictest self-defense or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped upon them by convention. \* \* \*

As neutralization alters the rights and obligations of all the States affected by it, either their express consent, or the agreement of the Great Powers acting as in some sort their representa-

tives, is necessary in order to give it validity. The word is often used in a loose and inaccurate manner to cover undertakings in abatement or mitigation of war, entered into by one or two States. We must therefore remember that there can be no true neutralization without the complete and permanent imposition of the neutral character by general consent. Thus Argentina and Chile could not impose an obligation on the rest of the world to refrain from warfare in the Straits of Magellan by declaring them neutralized, as they did by treaty between themselves in 1881.

That is the end of the quotation from Dr. Lawrence.  
Now, here is a quotation from Dr. Holland:

But an agreement between the States most directly interested may in practice amount to much the same thing, if they are powerful and determined, and covenant for the application of rules which have already received general consent in a similar case. The Treaty of 1901 between Great Britain and the United States for applying to the Panama Canal, when made, the rules of navigation now applied to the Suez Canal, is an illustration.

So you see that the word "neutralization" may be used in a qualified sense, and that in such a sense the Panama Canal may be said to be neutralized; but, as General Hains has observed, one of the characteristics of neutralized territory or waterways, although not an absolutely essential characteristic, is freedom from fortifications. Now, that placard which was exhibited here yesterday presented in large type not as it purported "The Treaty that was Rejected by the Senate," but the treaty that was communicated on February 5, 1900 by the President to the Senate, the treaty that was signed by John Hay and Sir Julian Pauncefote; and that treaty expressly prohibited fortifications, and the Senate consented to its ratification, after prolonged debate, with that prohibition in it, but the Senate also adopted the amendment to which Senator Morgan had objected.<sup>1</sup>

The next treaty, the one that is now in force, instead of re-enacting that explicit prohibition of fortifications, provides for what is really to my mind a more comprehensive neutralization. It ordains that

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<sup>1</sup>This amendment, which caused the rejection of the first Hay-Pauncefote Treaty by Great Britain, provided: "It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four and five of this article [II] shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order."

"the canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it." Now, where have we drifted? We are at the moment constructing fortifications, just as if the first Hay-Pauncefote Treaty had never forbidden fortifications—a prohibition, as I said yesterday, which was consented to by the United States Senate—and just as if the second Hay-Pauncefote Treaty, the one now in force, had never declared that no right of war or act of hostility should ever be exercised in the canal. I want to read to you now just another sentence or two from an article which you will find in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* for last January.<sup>2</sup>

"If a canal had been built and the United States and Great Britain had gone to war, while the Clayton-Bulwer Treaty was in force, the neutral state administering the canal would have allowed the public vessels of either belligerent to pass through the canal under the rules prescribed by the states guaranteeing its neutrality, just as the United States would do under the existing treaty, in its administration of the canal during a war to which it was not itself a party."

"But"—and here I come to one of the difficulties which probably will be adjusted—"the rules adopted by the United States in the Hay-Pauncefote Treaty, do not seem to have reserved to itself"—that is to the United States—"such belligerent rights as the changed conditions might have justified"—the "changed conditions" being our ownership of the canal and our exclusive control of it, subject, of course, to any obligations which we have incurred under the treaty.

Let me read this again:

But the rules adopted by the United States in the Hay-Pauncefote Treaty, do not seem to have reserved to itself such belligerent rights as the changed conditions might have justified, but to have left it in the position where it would be bound to allow such free passage to ships of war of its enemy as the neutralized state, being the territorial sovereign of the Canal Zone, would have done under the original plan.

There is one thing further that I would like to read from the same number of the *JOURNAL*—a citation from Mr. Wicker's recent essay on "Neutralization":

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<sup>2</sup>"Neutralization and Equal Terms," *AMERICAN JOURNAL OF INTERNATIONAL LAW*, January, 1913, pp. 47, 48.

This treaty with England, which, however, does not amount to complete neutralization, since it is an agreement between two nations only, further provides that the canal is to be safeguarded and maintained in neutrality by the United States alone, and consequently is a compromise between neutralization and complete American control.

The earlier Hay-Pauncefote Treaty, as signed by Secretary John Hay and Sir Julian Pauncefote and submitted by President McKinley to the Senate on February 5, 1900, provided for a really neutralized canal. The canal, in the words of this treaty, was to be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations; no fortifications were to be erected commanding the canal or the waters adjacent; and the high contracting parties, immediately upon the exchange of the ratifications of the convention, were to bring it to the notice of the other Powers and invite them to adhere to it.

The trouble is that the second Hay-Pauncefote Treaty was an attempt to make an adjustment of conditions to fit a plan that had been materially changed. The original conception of the interoceanic waterway was that, however or by whomsoever opened, it should be maintained for the commerce of the world, on equal terms, and permanently neutralized, like the Suez Canal, by agreement of the great Powers, for the promotion of peaceful trade between mankind.

Now, the result is, I think, so far, that it is a very qualified "neutralization," and perhaps it might be said that it is not neutralization at all, in its essential character, as defined by the publicists, that has been provided for the Panama Canal by the existing treaty, although the object of that treaty is declared in the preamble to be "to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be considered expedient \* \* \* without impairing the 'general principle' of neutralization established in Article VIII of the Clayton-Bulwer Convention."

The CHAIRMAN. I thought I saw someone else who desired to give a definition of the word "neutralization."

Professor AMOS S. HERSHEY. Mr. Chairman and Gentlemen: I do not believe it is possible to give a definition of "neutralization," so I shall not attempt it. However, I believe that that word appears to be used in various meanings in various senses.

I think the use of the term originally applied, of course, to the neutralization of Switzerland and later Belgium and Luxemburg. That term afterwards seems to have been applied, to a certain extent, to international waterways, to certain rivers. I do not know just to what extent it was applied, but it was applied to rivers like the Rhine and Danube, and so forth; but there it seems to me to have meant the common use of such rivers, and I think that seems to be the primary meaning of it as applied to the Suez and Panama Canals.

Mr. CRAMMOND KENNEDY. Under the guarantee of the great Powers?

Professor HERSHEY. Yes, a certain degree of neutrality is guaranteed. We have some idea of that, of course, in the neutralization of Belgium and Switzerland and so forth.

Mr. KENNEDY. That is right.

Professor HERSHEY. But I remember that Lord Cromer suggested, in connection with his work on *Modern Egypt*, with respect to the Suez Canal, that a better term would be "internationalization," that there is a certain freedom of commerce and free use of those waterways by the world, with, perhaps, certain restrictions on belligerent rights.

The term has also been used, although I think it is now more or less abandoned, in treaties speaking of neutralization and seeking a *bounty* in warfare. That is another use of the term that is somewhat different from anything that we have in these other cases. So it seems to me that what we have is simply a word which is used in different senses. It has different meanings, and I do not believe it is possible to give a definition of it.

The CHAIRMAN. The whole subject is still open for discussion. Is there any further discussion?

Mr. A. S. LANIER. I would like to say in regard to the word "neutralization," Mr. Chairman, that there does not seem to be any definition of it at all, and no one seems to be able to give a definition,



and, therefore, it is necessary to present a definition which can be interpreted to the best interest of your own country, and I should desire to see a definition put upon that word which would agree with the best interests of our own country.

#### BUSINESS OF THE SOCIETY.

The CHAIRMAN. If there is no further discussion, the business meeting will follow. First, we will have the report of the Committee on Codification.

Mr. JAMES BROWN SCOTT. In view of the lateness of the hour, I will simply make a preliminary report, without going into the details. The Committee on Codification directs me to state that, in its opinion, some of the most important and preliminary labors should be a careful ascertainment of the classification and systematic exposition of international law. For this purpose, the committee proposes to correspond with teachers of international law in all parts of the world, and to correspond likewise with publicists, in order to be able to adopt a classification in the fulness of knowledge. And, in the second place, the committee believes that, after having obtained these classifications and analyzing them, and having agreed upon one which appears satisfactory, its next labor should be to endeavor to define certain fundamental conceptions without which it is impossible to proceed to a codification of international law.

I am directed to inform you that the committee expects, at the next meeting, to report fully upon the question of classification, and on the definitions or conceptions, which doubtless will be placed before you at the next meeting of the Society, in 1914.

The CHAIRMAN. If there is no objection, this report of the committee will be accepted, with the understanding that they will report, as stated, at the next meeting.

The first item on the program of the business meeting is the report of the Committee on Nominations. Professor Woolsey, I think, is chairman of that committee.

Professor THEODORE S. WOOLSEY. The committee begs to recommend the following names as officers for the ensuing year.

*President,*  
Honorable Elihu Root.

*Vice-Presidents,*

Chief Justice White,	Hon. William W. Morrow,
Justice William R. Day,	Hon. Richard Olney,
Hon. P. C. Knox,	Hon. Horace Porter,
Mr. Andrew Carnegie,	Hon. Oscar S. Straus,
Hon. Joseph H. Choate,	Hon. Jacob M. Dickinson,
Hon. John W. Foster,	Hon. William H. Taft,
Hon. George Gray,	Hon. William J. Bryan,
Hon. James B. Angell.	

*Members of the Executive Council to serve until 1916.*

Hon. Augustus O. Bacon, Georgia.  
Hon. Frank C. Partridge, Vermont.  
Prof. Leo S. Rowe, Pennsylvania.  
Frederic R. Coudert, Esq., New York.  
Everett P. Wheeler, Esq., New York.  
Alpheus H. Snow, Esq., District of Columbia.  
Prof. William R. Manning, Texas.  
Prof. John H. Latané, Virginia.

The CHAIRMAN. What is your will in regard to the nominations made by the Committee?

[Upon motion duly made and seconded, the Secretary was instructed to cast one ballot for the nominees. The Secretary reported that the ballot had been cast, and the gentlemen mentioned were accordingly declared elected to the respective offices.]

Professor GEORGE G. WILSON. On behalf of the Committee on the Selection of Honorary Members I may say, that in view of the principle enunciated two years ago and reaffirmed last year before the Society, and which is stated in the Proceedings for 1912, page 191, the committee searched for a candidate who would be strictly a candidate of the character of those who are already upon the list of honorary members of this Society, but there is no one who meets with this requirement according to the opinion of the committee, at the present time. Therefore, the committee makes no nomination for honorary

member this year, and recommends that action upon honorary members be passed.

I will ask the Secretary if he will read the list. We have lost one of our honorary members during the year, Professor Westlake.

[Secretary SCOTT thereupon read a list of the honorary members.]

The CHAIRMAN. It would seem fit, if there is no objection, that the election of honorary members be passed at this meeting. Of course, it is entirely competent for the Society to make a nomination if it sees fit. It seems proper that some recognition of the services of Professor Westlake should be made. Is there anyone prepared to report upon that?

Professor WOOLSEY. This is a very brief notice, and an inadequate one. I think, however, that it is customary to present only the briefest possible notice on such an occasion.

There are two English publicists, men of high distinction in the field of international law, both professors of the science, both writing freely, very often divergently, upon mooted questions, both honorary members of this Society,—Holland and Westlake. We are called upon to mourn the loss—to England, to our Society, and to our science—of the last mentioned of the two at the ripe age of eighty-four.

Professor John Westlake as a writer upon the history and philosophy of the law of nations had no superior in his time. Without largely representing his Government in public he widely influenced public opinion. Careful and temperate in statement, scholarly in method, philosophical in thought, he embodied the highest ethical and legal standards of our profession. He was calm and logical and orderly. He was learned. He was just. The influence of such a man upon the development of the law can hardly be over-estimated.

The CHAIRMAN. It would be in order that we adopt this as a minute of the Society, and that it be spread upon our records.

[The motion was made, seconded, and agreed to.]

The CHAIRMAN. Is there any other business, Mr. Secretary?

Secretary SCOTT. None, except an announcement or two.

The CHAIRMAN. If there is no other business, I will announce that a meeting of the Executive Council will take place in this room at half past seven this evening.

Secretary SCOTT. Mr. Chairman, I desire also to call the attention of the members to the fact that unless all who wish to attend the banquet procure tickets at this time the regular order will be much embarrassed, because the seating arrangements must be made this afternoon, and the committee cannot wait indefinitely. I would therefore urge you, upon leaving the hall, to secure your tickets for the banquet, which will take place at half past seven this evening.

[A motion to adjourn was made, seconded, and agreed to.]

The CHAIRMAN. The meeting is now adjourned.

[Whereupon at 12:45 o'clock p.m., the meeting adjourned.]

## MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Saturday, April 26, 1913, at 7:30 o'clock p.m.

The Executive Council met at the New Willard Hotel at 7:30 p.m., on Saturday, April 26, 1913.

### Present:

Mr. Charles Henry Butler,	Mr. Jackson H. Ralston,
Mr. Frederic R. Coudert,	Mr. James Brown Scott,
Prof. Charles Noble Gregory,	Mr. Alpheus H. Snow,
Mr. Robert Lansing,	Rear Admiral C. H. Stockton,
Prof. John H. Latané,	Mr. Charles B. Warren,
Mr. Frank C. Partridge,	Prof. George G. Wilson,
	Prof. Theodore S. Woolsey.

In the absence of the Chairman, Mr. Charles Henry Butler presided.

Upon motion duly made, seconded and carried, the reading of the minutes of the last meeting of the Council, printed in the Proceedings for 1912, pp. 194-196, was dispensed with, and the minutes approved as printed.

The Chairman, Hon. John W. Foster, was reëlected.

The election of the Recording Secretary, the Corresponding Secretary, the Treasurer, and the Assistant to the Secretaries was the next order of business, and the following gentlemen were reëlected:

Recording Secretary—James Brown Scott.  
Corresponding Secretary—Charles Henry Butler.  
Treasurer—Chandler P. Anderson.  
Assistant to the Secretaries—George A. Finch.

The following gentlemen were then reëlected to serve on the Executive Committee:

Hon. Elihu Root,	Mr. Robert Lansing,
Hon. George Gray,	Hon. John Bassett Moore,
Prof. George W. Kirchwey,	Prof. George G. Wilson,
Hon. Oscar S. Straus.	

Upon motion, duly made, seconded and carried, the following committees were reëlected:

Standing Committee for Selection of Honorary members:

Prof. George G. Wilson, Chairman;	
Jackson H. Ralston, Esq.,	Prof. Theodore S. Woolsey.

Standing Committee on Increase of Membership:

Mr. James Brown Scott, Chairman;	
Mr. Charles Cheney Hyde,	Prof. Jesse S. Reeves,
Prof. John H. Latané,	Prof. Theodore S. Woolsey.

Committee on Publication of the Proceedings of the Seventh Annual Meeting:

Mr. George A. Finch,	Mr. Otis T. Cartwright.
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Upon motion, duly made, seconded and carried, the action of the Treasurer in employing an assistant at a salary of \$25.00 per month, was approved and the continuance of the employment authorized.

The report of the auditors approving the report of the Treasurer for 1911-12 was received and ordered to be filed. Messrs. Alpheus H. Snow and Clement L. Bouvé were appointed auditors for the ensuing year, and the report of the Treasurer for 1912-13 was referred to them for examination and report.

On motion, duly made, seconded and carried, the Board of Editors of the American Journal of International Law was continued as at present constituted, and the matter of continuing same permanently throughout the year was referred to the Executive Committee with power.

The appointment of the Committee on the Eighth Annual meeting was referred to the Chairman of the Executive Committee with the

suggestion that the personnel of the committee be somewhat changed in order to relieve the members who have served for several years.

Pursuant to the direction of the Executive Council that the Business Manager of the Journal consider the question of a book plate for the books belonging to the Society and that he recommend a convenient place where the books and periodicals might be consulted by the members, Mr. Finch reported that in his opinion it was not necessary at this time to adopt a book-plate, and that the books and periodicals of the Society should be placed in the headquarters of the Carnegie Endowment for International Peace, 2 Jackson Place, Washington, D. C., which is also the headquarters of the Journal. He presented a list of all the books and periodicals which are the property of the Society, which report was received and ordered to be filed.

A communication, dated April 16, 1913, from Messrs. Baker, Voorhis and Co., publishers of the Journal, was received and, upon motion duly made, seconded and carried, it was resolved that an allowance of \$20 per annum be made to them in full satisfaction for any and all loss sustained by them during the life of their contract on account of the issue of the Spanish edition of the American Journal of International Law.

A request from Messrs. Baker, Voorhis and Co., contained in the same communication, asking for an increase in the amount received by them for publishing the Journal, was received and referred, with power, to the Executive Committee.

An invitation from the officials of the Panama-Pacific Exposition of 1915 that the Society hold its annual meeting for the year 1915 in San Francisco in connection with the exposition, was referred to the Executive Committee, with the request to report thereon at the next meeting.

On motion, duly made, seconded and carried, all unfinished business was referred to the Executive Committee with power.

On motion, duly made, seconded and carried, the meeting adjourned.

JAMES BROWN SCOTT,  
*Recording Secretary.*

## TREASURER'S REPORT

April 25, 1912, to April 25, 1913.

### PRINCIPAL ACCOUNT.

#### *Receipts*

Life membership dues, 23 life members at \$100 each.....\$2,300.00  
(20 life members living.)

#### *Investments*

June 23, 1906	1	\$500 Central Pacific first mortgage 4% bond at 102 with commissions.....	\$510.63
Dec. 21, 1906	1	\$500 Central Pacific first mortgage 4% bond at 100½ with commissions and ex- change on check .....	503.73
Nov. 14, 1907	1	\$500 Central Pacific first mortgage 4% bond at 90 with commissions .....	451.08
July 2, 1908	1	\$500 Central Pacific first mortgage 4% bond at 97½ with commissions.....	486.75
			1,952.19
April 25, 1913	Balance on deposit at Riggs National Bank.....		\$347.81

### INCOME ACCOUNT.

#### *Receipts*

Balance on deposit at Riggs National Bank, carried forward from previous account .....	\$3,456.56
Annual dues for 1910, 2 members at \$5 each.....	10.00
" " " 1911, 26 " " .....	130.00
" " " 1912, 234 " " (Angel M. Bocanegra \$3) .....	1,173.00
" " " 1913, 579 " " .....	2,895.00
" " " 1914, 2 " " .....	10.00
Exchange on checks .....	1.02
Foreign postage 1912.....	\$51.71
" " 1913.....	85.76
" " 1914.....	2.00
Subscriptions to Journal .....	139.47
Proceedings .....	63.50
Income from investment of life membership dues in 4 \$500 Central Pacific first mortgage 4% bonds 8 coupons (4 due August, 1912, and 4 due February, 1913).....	80.00
Received for Spanish edition of Journal.....	11.00
Banquet Fund .....	434.00
(Tips at hotel paid in cash, \$21, total amount collected \$455.)	
Overpayment by Mr. Turner .....	10.00
	\$10,134.05



Forward . . . . . \$10,134.05

*Expenses*

*Salary Account:*

Business Manager (Checks Nos. 325, 337, 344, 353, 359, 364, 367, 377, 383, 385, 389) . . .	\$1,150.00	
Assistant to the Treasurer (Checks Nos. 327, 335, 345, 350, 356, 358, 363, 366, 375, 384, 386, 391) . . . . .	300.00	\$1,450.00
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*Secretary's Disbursements:*

Postage, telegrams, express charges, car fare, etc. (Checks Nos. 326, 338, 347, 352, 365, 368, 376, 382, 388) . . . . .	67.76
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*Treasurer's Disbursements:*

Postage, P. O. box, etc. (Checks Nos. 346, 343, 361, 372, 374, 392) . . . . .	15.36
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*Supplies:*

Stationery, notices, circulars, receipt books, etc.		
Byron S. Adams (Checks Nos. 332, 341, 357, 393) . . . . .	\$141.50	
Copenhaver (Check No. 348) . . . . .	5.30	
Fred S. Lincoln (Check No. 340) . . . . .	2.50	149.30
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*Subscriptions:*

Baker, Voorhis & Co. (Check No. 387) . . . . .	1.25
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*Advertising:*

Law Reporter Printing Co., addressing envelopes (Check No. 369) . . . . .	\$1.50	
Postage (Check No. 370) . . . . .	5.00	6.50
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*Furniture Account:*

A. Zichtl & Co.—bookbinding—(Check No. 328) . . . . .	\$3.40	
A. J. Wolfe—bookbinding—(Check No. 329) . . . . .	23.30	
Fred S. Lincoln—cabinet—(Check No. 340) . . . . .	6.60	33.30
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	\$1,723.47	\$10,134.05

Forward . . . . . \$1,723.47 \$10,134.05

*Storage and Shipment of Proceedings, 1907-II:*

Merchants' Transfer Co. (Check No. 355) . . . . .	\$19.95	
Weed, Parsons & Co.—storage—(Check No. 362) . . . . .	50.00	69.95

*Journal:*

On account of publication:		
Baker, Voorhis & Co. (Check No. 394) . . . . .	\$2,438.00	
On account of postage:		
Baker, Voorhis & Co. (Check No. 394) . . . . .	124.53	
On account of preparation:		
Otis G. Stanton (Checks Nos. 342, 360, 371, 390) . . . . .	\$200.00	
Theodore Henckels (Checks Nos. 351, 378) . . . . .	168.00	
V. Petrovitch (Check No. 373) . . . . .	9.90	
Geo. D. Gregory (Check No. 381) . . . . .	23.75	401.65
		2,964.18

*Reprints of Articles:*

Baker, Voorhis & Co., from Journal (Check No. 394) . . . . .	119.60	
Byron S. Adams, from Proceedings (Check No. 379) . . . . .	12.00	131.60

*Annual Meeting:*

Pan American Union—use of hall—(Check No. 339) . . . . .	\$100.00	
Byron S. Adams, stationery, printing programmes, speech, etc. (Checks Nos. 330, 332, 357) . . . . .	105.00	
Edna K. Hoyt, copying speech (Check No. 336) . . . . .	8.50	213.50

*Proceedings—1912:*

Byron S. Adams, printing, etc. (Check No. 393) . . . . .	\$550.58	
Reporting meeting (Check No. 349) . . . . .	107.50	
Postage, wrapping, etc. (Checks Nos. 369, 370, 380) . . . . .	103.50	761.58
		\$5,864.28
		\$10,134.05

Forward . . . . . \$5,864.28 \$10,134.05

**Banquet:**

Willard Hotel Co., banquet, flowers, etc. (Check No. 333) . . . . .	\$480.50		
(Tips to waiters paid in cash, \$21.)			
Byron S. Adams, tickets, etc. (Check No. 332) . . . . .	12.65		
Hotel expenses of R. L. Borden (Check No. 334) . . . . .	21.75	514.90	6,379.18
		<hr/>	<hr/>
Balance on hand April 25, 1913.....			\$3,754.87

Respectfully submitted,

CHANDLER P. ANDERSON,  
*Treasurer.*

Washington, D. C. *April 25, 1913.*

## ANNUAL BANQUET

New Willard Hotel,

Saturday, April 26, 1913, 7:30 o'clock p.m.

Mr. FREDERIC R. COUDERT, Toastmaster. Gentlemen, you may have noted that since our last banquet the toastmaster has been armed. Why I do not know, because, if I remember correctly, there was no attempt last year to attack him. He was very much encouraged thereby, yet possibly, owing to the ebullition of vivacity that the delightful subjects that we have had to discuss have given rise to recently, he has been furnished with this weapon.

I am very sorry to see, and I know in saying it that I express the feeling of everybody here, that our honored president, Senator Root, cannot, owing to a domestic bereavement, be present this evening. We all know what he has done for our Society, how devotedly he has worked for it, and how much it means to him.

For some reason of an anti-climatic nature, the precise explanation of which can only exist in the brain of one man, the Secretary asked me if I would act in his place tonight. Possibly he wished, in friendly rivalry, to show how much better he was than I, for his silence is always golden and my speech is not silver.

Gentlemen, we are here to assess and take account of stock, as it were. We have been performing most important functions. I incline to the belief that, with the exception of very few of us, we are entirely too modest, that we do not realize that we have been settling, at great expense of nerve power and energy to ourselves, the serious questions that are agitating the country, and that, by reason of our cogitations, deliberations and exchange of views, Congress, or the American people at least, will soon enter on a plan very fairly marked out, and the statesmen who are trying to govern us, will find, as soon as they are able to peruse the pamphlet that will be published next week, that they have full, adequate and excellent authority for any course of action that they may choose to take in regard to any question that arises.

Somebody has said that there are more lawyers in the United States and less law than anywhere else. I am inclined to think that there may be some truth in that. Now, I come from a very excellent town, quite inimitable in all respects. It is the reverse of a cemetery, because everybody in it wants to stay in it, and all the people who are outside want to come in. Nevertheless, we suffer from a plethora of

laws, and we have developed, perhaps by reason of the fact that we have so many laws—we are not lawless; we have too many laws—we have developed a system that unkind people characterize by hard names. In the days of the Stuart kings, it was characterized as “the dispensing power,” but when certain high chiefs of our police and general security system find that laws are too numerous, too complex, too much misunderstood by the mass of people, instead of resorting to harsh measures and to violence, they exercise that power which the Stuart kings exercised with so much gratification to themselves, for a short time. We do not characterize it in exactly the same way, but, perhaps, philosophically it is very much the same thing. It is due in part, perhaps, to the fact that law and actual conditions do not harmonize, and, when they do not, so much the worse for the law.

I believe it was Lord Acton, speaking of a certain cynical writer in the Middle Ages, quoted him as saying that “the Lord did not desire the death of a sinner, but rather that he should pay and be saved.” And so it is in international law. The value of international law as a substitute for might is that the international lawyer and the international type of mind, do not desire the death or destruction of any nation, but merely that it shall pay and be saved. We have had a good deal to say about construction, construction of statutes and construction of treaties. It was, indeed, very interesting.

I confess I was not wholly surprised to know that the word “all” sometimes meant “some.” That did not seem surprising to me. I once spent a good many weeks in a neighboring high tribunal trying to find out what the words “United States” meant. I was not able to find out; I have not yet been able to find out very definitely. Perhaps there is a certain philosophic reason back of these difficulties of construction. Perhaps they could be instanced by a horse trade, of which I was the unwilling victim. The illustration is perhaps homely, but we are all more or less fond of horseflesh, and seeing a very fine looking horse, and hearing the encomiums pronounced upon him by his owner, I resolved to purchase him, and after having purchased him I found he was utterly worthless in the hunting field, and when I reproached the former owner, I said, “You told me that he was very fine.” He said, “Sir, I did, and I believed he was very fine, and he is very fine looking, but the trouble is that while I was thinking of appearance, you were thinking of performance.”

Now I understand from some of the diplomats here present that there is a rough and ready explanation. I understand that when

treaties are made by diplomats, each diplomat thinks that the other diplomat does not understand what he wants, and that, therefore, if the construction is elastic, if they have such a vague, philosophic word as "all" or "some," it then may be possible to construe its meaning as something different from what the untutored intellect naturally assumes. That may indeed be a practical reason, but I doubt if that goes to the root of things. I think the reason is deeper than that. In my own town, where we think less of the practical things than you do, where we have less hunting of all kinds, including offices, and more of the higher realms of disinterested philosophy and altruism, we had a visit some time ago from a very noted philosopher from France, I think I may say the leading philosophic mind, Mr. Bergson, and since Socrates taught in ancient Attica, I doubt whether so fine an audience ever presented itself to hear so delightful a gentleman. In fact, the town turned out in great force, and we learned from him some very interesting things. We learned from him that if we really wanted to know about things, we must stop reasoning about them, that reason and logic would always bring us into mental chaos, and that the truth was ascertained by a much more summary method, namely, the method of intuition. I do not assume that, even with his encyclopedic knowledge, he had gathered all of his philosophic ideas from the reports of the Supreme Court of the United States, but from some of the dissenting opinions I have found therein, I believe he would derive very great comfort, because if I remember one of them, the statement is made that legal judgments are predicated upon some infinitely subtler thing than anything that could be founded on a syllogism. Therefore, when I heard these learned gentlemen differing about matters that the ordinary man in the street would not have sufficient intellect to have two minds about, I thought perhaps there might be some deep underlying reason for it, and I turned to my satchel, where I always keep some philosophic consolation, especially when I am at meetings of this kind, and found a copy of Mr. Bergson's introduction to metaphysics; there I found what I think is the explanation of the psychologic state of mind of which we have been witnesses during the past day or two, and I will read it to you, because it seems to me so absolutely to the point. It has removed all my doubts and all my troubles, and it goes to the real basis of international law, and the reasoning that is predicated upon it.

Mr. Bergson says:

"It would follow from this that the absolute truth [which, of course,

all of us are seeking] could only be given in an intuition, whilst everything else [he means everything else than truth] falls within the province of analysis. By intuition is meant the kind of intellectual sympathy by which one places oneself within an object [that is to say, a treaty], in order to coincide with what is unique in it, and consequently inexpressible."

Gentlemen, this seemed to me to be the explanation.

If we want the truth about these matters, the truth we must not attempt to express, because the moment we attempt to express it, we cease to grasp it intuitively, and we lose it. Therefore, if we were true philosophers, I suppose we would do well to merely announce our intuitive conclusions. They would almost certainly be right, and having done so, we might, perhaps, not volunteer to request directly, but we might request, we will say, the highest law officer of the government to carry our philosophic conclusion to an interpreting tribunal and to explain to them that when they were dealing with these important matters of treaty and international law, it might be well, in the words of the French Revolutionary Committee, *la mort sans phrases*, to announce conclusions without those misleading formulæ which Mr. Bergson says never lead to anything save confusion.

I recently had a personal experience, for which I would apologize for speaking of were I not in an audience of lawyers, and lawyers always speak of their own experiences and are very little interested in those of others, perhaps because their own experiences are those with which they are the more familiar. I was again reminded of Mr. Bergson in the trial of a case in connection with a treaty, where the question had been decided in a certain way in the Supreme Court of Massachusetts. That court, in a very short opinion, said that the treaty meant what the English language would convey to the ordinary mind, and that it actually created something that had not existed before the treaty was put into force. In other words, they actually put themselves upon record—put themselves on record—on the proposition that the diplomatic minds who made that treaty actually intended to accomplish a result! Now, that seems very startling. At the same time, in the State of New York the lower courts, at least, followed that result, and generally throughout the country it was acquiesced in; but another case came up from the illustrious State of California, and the jurists in that eminent jurisdiction, possibly because of the greater familiarity with the psychologic work of the diplomatic mind, said these gentlemen who made the treaty meant nothing at all; they were

really satisfied with the *status quo*. We carried the case to the Supreme Court of the United States, where they brushed aside, in easy fashion, the Massachusetts, New York, Michigan and the other rulings, to the effect that the treaty did accomplish something, and they explained very effectually to that tribunal that that treaty was a collocation of sound words, which had no possible object save to assuage the feelings of those who made them, and the court therefore decided, possibly from extreme conservatism, that the situation had not been changed in any way by the treaty. The result of the treaty, at least, had been that it had annoyed and puzzled several nations over a number of years and made courts give contradictory opinions. The moral of the case seems to be that, so far as treaties and international law are concerned, we must more or less assume that everything that is done is done with the intention of leaving things where they were before. At least that is the moral I draw from the decision. I may be wrong, and possibly I may be biased, but I do not see that any other indication is possible.

It is interesting to see how the cycle revolves. We are witnessing a recrudescence of particularism, if I may be permitted to use a phrase of my own; I never heard it during the debates on this very matter, and hence I think it must be original. If it is not, it certainly ought to be—but we are witnessing it all over the United States, and it is really very interesting to us who are steeped in philosophy, history, international law and all those things that have no relation whatever to practical life; it is very interesting to find that a town or a state or some subdivision of what we used to consider internationally, at least, as a mere unit, may interpret a treaty according to its local needs and feelings. That is a very convenient doctrine in the parish or in the locality. The only thing about it is that it seems to be a startling reversion to earlier conditions. It is perhaps atavistic. In the case of which I speak there was cited a decision in Louisiana in 1856, but the Massachusetts courts, with that strong national feeling inbred in them, held that there were certain views entertained as to the relation between the nation and States and foreign nations, in 1856, which had been more or less obsolete, but I take it that they were not wholly right in that, and there seems to be a movement now, the result of which would be to resolve us into those atoms from which we originally came, if only followed out to its logical conclusion. I cannot blame those gentlemen who talk of unconstitutional treaties, nor can I blame anyone else for not perusing with the same assiduity that all of you gentle-



men have done, the decisions of the Supreme Court of the United States. They do not present, in many respects, the same attractive features of other periodic literature; but, at the same time, there are certain things in them which it would be well to read. If we went back to the time of Chief Justice Marshall, we would find similar contentions that were made at that time with most unvarying lack of success in every respect.

Possibly I am somewhat of an antiquary in referring to those old decisions; but, after all, it seems to me that the Supreme Court has taken care, as far as it could, that such an apparently absurd recrudescence should not occur. However, I might add that I know of no better instance of a court doing its duty, and evidencing an understanding that the United States was not the whole world, however important it was, than the very excellent decision in the Fifth California Reports, in which it was set forth fully that the treaty-making power has a full right to deal with aliens in regard to escheats and other matters relating to their lands, and I recommend it to all of those not coming from that State who are not so familiar with it as the gentlemen from there undoubtedly are.

Of course, international law is a very interesting thing, but it is something more than that. It seems to me, to use the phrase of my friend, Dr. Nicholas Murray Butler, of Columbia University, the study of international law and the working of international problems lead to the creation of what he termed the "international mind." I take it that that mind should make every patriotic citizen realize that his country is all the greater and all the more important because it is not isolated, because it is a part of a greater and even more magisterial whole; that it is greater in proportion and stands willing to do its duty as one important leading majestic unit in that collocation of national elements we call the world.

I think, therefore, that we are particularly fortunate in having here with us tonight a gentleman who represents, perhaps, as well as anybody on the continent of Europe, exactly what I have in mind when I say "the international mind"; a man who has held the highest official stations in his country, who stands as the foremost in patriotism and devotion to the higher ideals of his own land, and who, nevertheless, has had the time and the ability to devote the surplus of his energy to the betterment of mankind, and who has taken a foremost part in almost every international convention that has occurred in the last twenty years. It was just twenty-four years ago since I saw our hon-

ored guest, Mr. Gregers Gram, sitting on the Bering Sea Arbitration Commission, which was a splendid and dignified body. I do not say that wholly from the fact that I took the very important part of assistant to a private secretary in it. It was a gathering of the best legal and diplomatic minds of all Europe, and it was a fine and majestic spectacle to all of us who were there, to see gathered together, for the settlement of this controversy, the distinguished jurists from England, from America, from Norway and from Italy. It was indeed, a very fine, inspiring sight presided over, as they were, by that great Frenchman Baron DeCourcel. The mere fact that that great tribunal, composed of those great men, was there debating saved us possibly from a serious crisis.

The charge is often made of lawyers, that we are men of talk and not of action. I oftentimes thank Heaven that we are not men of action, because it is men of action—for action may be evil as well as good—that make the trouble between nations, and then the lawyers talk and content themselves with rounded periods; the action that may be for evil and for strife and for destruction is thereby averted, and therefore I say we are fortunate in many respects in not being men of action.

I take particular pleasure in saying to you that Mr. Gram has traveled for two weeks to be here with us this evening, and he has been good enough to say, in response to our unanimous request, that he would address to us a few words.

I welcome him here as an old friend and as an eminent representative of the best international mind. Mr. Gram.

REMARKS OF HIS EXCELLENCY GREGERS W. W. GRAM,  
*Minister of State of Norway.*

Mr. GRAM. Gentlemen and members of the American Society of International Law: It is with the deepest gratitude that I have heard the kind words which were addressed to me by our toastmaster this evening. I wish to thank you for the reception that you have given me this night. What is present in my mind at this moment is to extend to you my heartfelt thanks for this reception.

I can not tell how many times I have sat at home and said to myself that there was something wanting in my education. I had not seen the United States. It may be that it is a little late now to complete my education, but still I feel that I have a strong desire to learn

and to see with my own eyes instead of hearing from others. It seems to me that to everybody who cares for the progress of the world it must be of a high interest to come to a country the destiny of which is so closely connected with the destinies of all the civilized world.

Looking back on the last century, we must recognize in all parts of the world how much we are indebted to the United States for what has been done here to make men more free, more liberal, and larger in their views; and if I have confidence in the future, as I have, it is in my mind that we must be sure that this country will continue to take a large share in the future in the great common work of civilization. I am a Norwegian. It is natural for me to think of the thousands and thousands of my countrymen who crossed the ocean to come here, and who have found not only prosperity, but a new fatherland, a new home. I think it is quite natural that such a thing must be a mighty tie between nations.

Gentlemen of the Society, I want to say to you that I am happy to have had an opportunity of assisting at an annual meeting of this distinguished Society, a meeting which has been to me one of very great interest, and I ask permission to present to you a greeting from another international association, *l'Institut de Droit International*.

I am proud to say that we have present here men who are among the most distinguished members of that association. I regret very much not to see the president of this Society, Mr. Root, who is one of them, but I have the pleasure of seeing my good friend Mr. Scott and others. I think it is in the interest of both associations that the members of them meet and exchange their views upon matters laid before them.

I will never forget the reception which has been given to me, and I thank you very much.

The TOASTMASTER. Gentlemen, if the Honorable Mr. Gram thought that there was a lack in his education because he did not know us very well before coming here, by his admirable paper and his speech and his gracious presence he has filled at least one void which existed in our education before he came.

There is in Europe one country—I was going to say a little country, but that is not the word, because if bigness consists of high principles, if it consists of altruism, if it consists of spiritual power, if it consists of standing for the right and for fairness among men, then Holland

is a great country, and always has been. It was great in the days when the military ideal stood high, and, if I remember rightly, none other than Hollanders were accustomed to carrying brooms at their mastheads in a certain historic channel. But times pass along, and having excelled in the ideals of the Middle Ages, they left them to excel in the ideals of modern times.

There is this one center in Europe where peace and amity dwell, and where all nations, on a common ground, of common justice and common courtesy, may meet to settle their controversies. I have wondered sometimes at the explanations of the historians, who are much better equipped than I to give it to you, but I came across, in a simple sort of a way, something of an explanation. A number of years ago, before the introduction of the automobile, when the highways were meant for ordinary individuals and for pleasant pastime, I was bicycling through that lovely country, and I struck up a friendship with an agreeable young Hollander. I found him delightful, and he asked me to his home. His sisters were even more delightful than himself, and I saw much of them for several days. We were traveling together, and one day a particularly dignified and pompous individual passed us by, and I was struck with his look of superiority and aristocracy, and I asked my young friend, "Who is that? Do you know him?" "Oh, no," he said, "I could not know him. He is an advocate, and I am only a merchant."

Surely, that shows that a lawyer gets at least in one country in Europe the place in society to which he is entitled, and perhaps that is one of the reasons of the extraordinary preëminence of this great country. But if that explanation be inadequate, our very honored guest, his excellency the Minister of the Netherlands, Mr. Loudon, will explain to us the other reasons, and will tell us about that wonderful land, the great center of international law and peace. Mr. Loudon.

REMARKS OF HIS EXCELLENCY JONKHEER J. LOUDON,  
*Minister of the Netherlands.*

MR. LOUDON. Mr. Toastmaster and Gentlemen: It certainly did not require very much persuasive talent on the part of Mr. James Brown Scott, whom you all know, appreciate, and probably love, to induce me, the representative of Holland, to accept the kind invitation

of the American Society of International Law to be present at this banquet. It did require a little more persuasion, at first, on the part of Mr. Scott, to get me to speak this evening, and to speak on The Hague as the center of international activity. When he mentioned it, I said, "Why, everybody knows what The Hague's international activity is. What do you want me to say?" Well, you all know Mr. Scott, and when this bard of international law had sung to me, I was captivated by his melody, and so it is that I am here, addressing you.

Gentlemen, it is indeed a great pleasure for me to be with you, and I want to thank you, Mr. Toastmaster, for the kind words in which you introduced me.

It is gratifying to me, as a representative of Holland, to feel that my country is more and more being recognized as a center of international activity. Mr. Scott was so kind the other day as to even call The Hague the capital of international activity. I am too modest to accept that, but I certainly admit that it now is an international center, and to recall how it so came to be, I need not go very far back in our memory. I have only to mention to you the name of my distinguished compatriot, Mr. Asser, who started The Hague's international activity by his series of conferences on international private law. A few years later, the First Peace Conference took place. When the world was first startled by that proposition of Czar Nicholas II of Russia, whose aim was the establishment of universal peace and disarmament, most people thought that, for the seat of the conference, the Emperor would choose some neutralized country, Belgium or Luxembourg or Switzerland. It is hard to know exactly what led the Czar in his choice of The Hague, but certainly he must have been attracted to Holland as the old seat of historic learning and of high ideals, the land of freedom of thought and action, a small country surrounded by mighty neighbors, but, I am happy to say, uninfluenced by those neighbors; a country not of such perfect quiet as its peaceful landscape, its meadows, windmills and cows would indicate; a country not so entirely devoted to peace, that it is not ready to fight for its independence in case of need. We Hollanders bear in mind that we have to defend our own neutrality in Europe in case of that so often predicted conflict which we hope will never take place between our neighbors; we bear in mind that we also have to defend our colonies, that vast dominion in the East Indies, where we have no less than thirty-eight million natives under our control. and which I am proud

to say is at the present time governed on the most liberal lines, on ethical lines, with the idea that colonies should not exist for the benefit of the exchequer of the mother country, as our forebears thought, but above all for the good of the natives.

Then, Holland was the country of our great Grotius—and when I say “our,” I refer to all of you—our great Grotius, the father of international law. The selection of The Hague as the seat of the Peace Conferences was indeed a tribute of the civilized world to the memory of Hugo Grotius. I am sorry to say that in the days of Grotius there was internal strife in Holland, as a result of which he was sent to prison. I presume you all know the story of how his wife succeeded in rescuing him by introducing into the prison a case of books for the learned man to study, then placing him in the case, baffling the prison wardens and getting him out of the country. Well, it is a stain on our country that he should have had to leave it in that fashion; but I am glad to say that Holland soon recognized his immense value. I think that if any statue is to be erected at the opening of the Peace Palace, it should be a statue of Hugo Grotius.

I was mentioning Professor Asser's private law conferences and the Peace Conferences. There are many more. Only today, in looking over papers at home, I found there had been no less than thirteen international conferences at The Hague in the last three or four years. There were conferences on alcoholism, on education, on housing, the opium conference, etc.

People often say that the Peace Conferences have not been a success, but in this gathering there are doubtless very few men who agree to that verdict. On the contrary, these conferences have accomplished a great deal. Just think for one moment what it meant to obtain a consensus of opinion on matters like good offices, mediation, rights and duties of neutrals, the institution of an international prize court! Think what the first conference accomplished when it instituted international commissions of inquiry! I need only refer to the Dogger Bank incident, and I believe I may say that hostilities were averted at that moment by the fact that the first International Peace Conference had created those commissions of inquiry.

Gentlemen, it is a particular pleasure for me at the present day to mention these commissions of inquiry, because only two days ago the Secretary of State submitted to us diplomats a suggestion to present to our governments a so-called peace plan, a draft agreement between

the United States and each of our countries which, in order to avoid possible wars in the future, states that the contracting parties will submit all questions in dispute between them to an international commission for investigation and report, that commission to act on its own initiative, the parties reserving their right to act independently after the report is submitted, but agreeing not to go to war until then. In other words, there will be no further obligation as to the final settlement of the dispute, but somewhat on the same lines as the Dogger Bank investigation, learned men, eminent men, probably chosen beforehand, will put their heads together, and state clearly what the points are, leaving it to the parties to judge whether they are right or not, whilst, meantime, popular irritation is likely to subside.

The Second Peace Conference has led us on the way to a very great institution, which is most desirable for the furtherance of the world's peace, and that is the recommendation concurred in by no less than forty-five Powers, to create an International Court of Arbitral Justice, supplementary to the existing permanent court of arbitration, which, as you all know, is not a real court, but merely a panel of judges, from which a choice must be made for each case of arbitration. I believe we may say that a great step has been taken. Forty-five Powers agreed upon this, that there should be a sort of supreme court of the world, the members of which should be real judges, men from various countries trained in international law, men who understand not only the laws of their own country, but also the mode of thinking, and the way of doing business of other nations, men who would represent the various judicial systems of the world. The Powers have not, alas, succeeded on one important point, and that is the method of selecting the judges for the International Court of Justice.

Now, I think, Mr. Toastmaster and gentlemen, it would be a good thing if the members of this Society would devise a solution of that problem. It is what you would call a pretty tough proposition, but I trust they would succeed.

Gentlemen, in September of this year an event of international importance will take place at The Hague, and that is the opening of the Peace Palace. I am happy to be able to state this on American soil, because in that respect again, we Hollanders owe something to America, and to a most generous American citizen—the Peace Palace. The Peace Palace will give an opportunity to the permanent court of arbitration, to international conferences, or, later on, to the members

of the supreme court that I have just mentioned, to come together and to decide the great international questions.

There is in this country a great peace institution, very young, but the trustees of which are some of the most eminent men of this country, and the funds for which were given by that same generous citizen I was mentioning. I mean the Carnegie Endowment for International Peace. I am happy to say that our friend, Mr. James Brown Scott, is its secretary. This institution has suggested, in continuance of a proposal which was made at the Second Peace Conference by Roumania, that there should be created in connection with the Hague Peace Palace an Academy of International Law. I think you will all agree with me that the Peace Palace and the work of The Hague as a center of international activity would not be complete without the establishment of such an academy of international law. The Carnegie Endowment and my government have agreed that this academy should not be a sort of world-wide university, competing in any manner with existing universities. No; it would be a creation entirely apart from anything already existing. It would be an academy founded upon an international basis. The board of the academy would consist of former presidents of the world-known *Institut de Droit International*. The lecturers would come from different countries, from every country, if possible, and they would get together only in the summer months, during the vacations of all other universities. They would represent the ideas of the different countries on matters of international law. Next to that, we want students from all countries to attend these meetings. We therefore hope that all the governments will agree to this proposal; that they will encourage it in every way they can, by undertaking either to send to The Hague, at government cost, young students of international law, future diplomats, young officers of the army and navy, or perhaps to give an advantage later on, when a choice is made of certain public servants, to the men who have attended those lectures.

I have discussed this matter more than once with our friend, Mr. James Brown Scott, and I am glad to take this opportunity to impress upon you the great significance of this contemplated institution. I hope and trust it will not lack the moral support of a society of the immense importance of the American Society of International Law.

I have been in this country for four and a half years. I feel very much like one of you, and I must tell you that one of the greatest



pleasures I have in looking upon matters like that of the peace movement and of The Hague as a center of international activity, is that America is so closely connected with us in the furtherance of our object.

At the First Peace Conference, Mr. Andrew D. White was the president of the American delegation, and your representatives did all they could for the cause of arbitration, and they succeeded in convincing even those who were opposed to it. Mr. Andrew D. White did a thing on that occasion which pleased us, particularly in Holland. It was on the Fourth of July, 1899, when he went with his fellow delegates to the old church in Delft, where Hugo Grotius is interred, and, in the name of the United States, laid down a golden wreath on his tomb. That is a thing we shall not forget.

The Second Peace Conference, as you know, was due to the initiative of President Roosevelt and Mr. Root who, I am sorry to see, for a sad reason is not in our midst this evening. The actual instigation came from the St. Louis meeting of the Interparliamentary Union. The proposal for the creation of the supreme court that I was referring to, the International Court of Arbitral Justice, was again due to the American delegates, and they worked hard for it. Your secretary, Mr. James Brown Scott, is one of those who did the hardest work.

Well, all of this, gentlemen, brings us very near to each other, and now let me end with a word of very high appreciation of your most valuable secretary, Mr. James Brown Scott. I have known him now for a number of years. He is a dreamer; you may say a visionary, an idealist, but his vision is founded on the solid rock of erudition, of true knowledge, and is coupled with real practical sense. I believe that such a man can do great things not only for the American Society of International Law and the Carnegie Endowment, but also for the cause of peace and of good feeling between the nations of this little world of ours as it wheels on in eternity, small as it is, with great purposes, great thoughts, and great ideals.

[At this point, a toast was proposed and drunk to the health of Queen Wilhelmina of Holland.]

The TOASTMASTER. I am sure, my friends, that in view of the exaggerated eulogium on our country spoken by his excellency as to

the aid that we have rendered his country in the splendid and notable work done by it as the center of international thought, we can say that, if Hugo Grotius owed his life to books, we surely owe our philosophy to him.

It seems to me that the suggestion that we discuss the appointment of judges of this international tribunal would be a very good one. In discussing that, I think we might also discuss the advisability of suppressing the reporters of this new tribunal, in order that we may not have these incomprehensible law reports, but may resort to the method of intuition in discerning the reasons for judgments.

Now, it may seem a far cry to the uninitiated from Holland to Texas. I do not know just why it should be so, but to some it may; but I only know that they have one thing in common. They both produce men.

I sometimes think that possibly the American people underestimate Congress as a body. Possibly it is because of the shrinking and timid nature of the majority of members of Congress hiding themselves under a bushel and seeking to avoid notoriety. People do not realize the amount of splendid and disinterested labor that is lost in the legislative halls, apparently, for it is only apparently lost, and yet we must remember that Congress is an international body; that men come from all these great and imperial States, and that in that international body, as a rule, their controversies are settled by arbitration. I do not mean that that is invariable, but it is the rule.

Now, we have here tonight, as representing that great body, an honorable gentleman who has interested himself in the great cause of international good will on the Interparliamentary Committee, who has served there for years, and who has had the courage to serve on the military committee of Congress, because we must realize that if the great ideals of the United States are to be made good, if injustice is to be resisted, if the country is to live up to its civilization, it must first keep order at home and compel respect abroad, because, until the whole world is so civilized that no nation shall longer possess predatory instincts, an army will be necessary, just as a police force will be necessary until every man is so civilized that the atavistic traits are wiped out.

Therefore, it is with particular pleasure that I introduce an eminent gentleman who, for twenty years, has honored Congress, and who is a friend of all of us, Mr. Slayden.

REMARKS OF HONORABLE JAMES L. SLAYDEN,  
*Member of Congress from Texas.*

Mr. SLAYDEN. Mr. Toastmaster, I feel that I owe a word of explanation to such of our guests here this evening as know me for the appearance of my name on this program. It is as much of a surprise to me as no doubt it is to most of you, and perhaps I appreciate more keenly than you do now, but may not later, the mistake of having put it there. It is all chargeable, I may say, to the secretary of this Society, Mr. James Brown Scott, of whom our distinguished friend, his excellency from Holland, has just spoken in terms of "exaggerated eulogium." Mr. Scott called on me two evenings ago and told me that a great calamity had befallen, that one of the most eminent and attractive speakers in the country, who had promised to address you to-night, had suddenly been called away on what we hope will be a pacific mission to the Pacific Coast, and that he knew of no one in the city who could fill his place so well as I, in the way of suggesting what you have lost by his going away. Now, rashly, in a moment of weakness, after a day's work, when will-power and body were both exhausted, and because he was tearful in his petition, I consented to come and to make you appreciate still more keenly what you missed by the absence of the Secretary of State.

When I told Mr. Scott that I came from a State where there was supposed to be no law, and where, of course, I learned none, and that I had served for eighteen years in a law-making body, which had added to the original confusion of my mind, he thought I would be an entirely appropriate person to address an organization like this on international law.

When I asked him upon what subject I should address you, he said, "Well, almost anything; they are patient and courteous, and they will not throw the crockery at you." He further said that, as they prospered in turmoil and reveled in strife, he thought perhaps it would be a surprise to them if I said something about one association composed of earnest, energetic, patient, plodding men, who have devoted their lives to the work of bringing about peace, and he suggested that I tell you briefly—and he emphasized the word "briefly"—of the Interparliamentary Union for the Promotion of Arbitration, which, in spite of that extraordinary and almost intolerable name, is a worthy organization, I assure you.

In order that I might tell the story within the compass of the eight or ten minutes allotted to me, I wrote it down, and that I may not become discursive or tiresome, or at least more tiresome than your patience will endure, I shall read to you this brief sketch of the organization, a history of that organization with which perhaps some of you are not familiar.

Practically every definition of the term International Law that has come under my observation says, in substance, that it is a body of rules, or customs, generally accepted as just and reasonable and worthy to control nations in their relations with each other. That, at least, is about what the average man understands the term to mean.

If it is based on justice, if it does tend to keep the peace between nations, if its influence is to protect the weak from the trespasses of the strong, then, surely, international law ought to be translated into fact. It ought, also, to be incorporated into the system of municipal laws of the various governments and provision should be made for enforcement under proper penalties for violation.

Unfortunately, international law is not automatic and does not, of its own motion, always get into operation in time to avoid the horrors of war and to prevent gross acts of injustice. There should be some agency at hand in great crises to save nations from the consequences of their own folly and to compel the application of these just and reasonable rules. Having been previously agreed to, they may, by their pertinence to threatening conditions, avoid the misery and waste of war if opportunely employed.

Such an agency we already have. It is the Interparliamentary Union, which was founded in Paris in 1889. In many respects it is the most important international organization ever created. It was not organized to promote the glory of any man, or the interests of any one country. It is a purely altruistic body, and for twenty-four years has been exercising a wholesome influence on the affairs of the world.

For this great and active servant of right the world was indebted to the late Sir William Randal Cremer. Cremer was a workingman, a carpenter, who spent his whole life in an effort to avoid wars, which he often said workmen did not make but had to fight. As long ago as in 1871 he organized among trades unionists in Great Britain the International Arbitration League. For a few years the League had a useful career, but finally fell into such radical control that the

founder withdrew and in a year or two it ceased to exist. But Cremer did not abandon the great central thought, which was international arbitration. He labored under the tremendous handicap of obscurity and a lack of means until 1885, when he became a member of the House of Commons. From the vantage ground of a parliamentary seat he continued the struggle for peace through arbitration. At his instance a conference was assembled in Paris in 1888. That conference, which consisted of about fifty French deputies and twenty-eight members of the British Parliament, laid the foundation for the Inter-parliamentary Union for the Promotion of Arbitration. The first formal session of the Union was held in London in 1890, and since then it has had sixteen other meetings in the various capitals of the world, including one in St. Louis in 1904.

That it has justified its existence and the pecuniary sacrifices of the members who have gone about the world doing valuable public work at their own expense is not doubted by anyone familiar with its history.

It aims high. Its purpose is to substitute the reason that is, or may be, embodied in international rules—international law, if you please—for mere force in the settlement of disputes between nations. That it has not always been successful is, unfortunately, true, but that is no reason for abandoning the great work. No sane person ever thought that it would be immediately or entirely successful. But there has been a distinct, clearly ascertained and valuable advance toward the goal. Wars have not ceased, nor will they for a long time, but the world, through this particular organization and kindred societies, has been given a clearer idea of what they mean, what they cost and the sacrifices they entail. One thing is very evident, and that is, if continuous peace is ever to come, it will be through such associations as that which I am telling you about.

The Union is composed of such members of national legislative bodies as voluntarily associate themselves for the work. Russia and Turkey, since they established constitutional government, are represented in the Union, and I do not doubt that at the conference which will assemble at The Hague in September, China will have parliamentarians on hand to represent the newest constitutional republic.

Being composed of legislators, the Union is in a position to consider the principles of international law and to call them to the

attention of the parliaments of which they are members, and, occasionally, by the exercise of individual and associated influence, to procure the incorporation of these principles into the municipal laws of their respective governments.

The great Hague Conferences, which, by the way, were largely the result of the activities of the Interparliamentary Union, and which is a sort of diplomatic body, drafts and adopts treaties and conventions and recommends them to the participating governments for ratification. The Union also considers such proposals and, if they are approved, goes to work actively, as members of various parliaments, to impress their fellow legislators with their importance. It is no mere mouthpiece of the Hague Conference, but acts independently, when not inclined to coöperation.

The Interparliamentary Union has exerted a great and, I think, wholesome influence upon internationalism, or in the development of what Dr. Butler of Columbia calls "The International Mind." It is helping men to see across national boundaries. It will suffice in an address limited to eight or ten minutes to refer to only one or two of its accomplishments.

The project to establish an international court of arbitration is of long standing. The minds of men who believe that it is better to promote commerce than to impede it, to conserve property than to destroy it, to save life than to take it, have long been turned in that direction. For these reasons they stand for arbitration.

The conferences of the Union at The Hague in 1894, and at Brussels in 1895, were almost entirely given over to the discussion of the establishment of a court of arbitration. That at The Hague took up as its main business the discussion of a report made by the Honorable Philip Stanhope, President of the British Group of the Union, on the establishment of a Permanent International Court of Arbitration.

Mr. Stanhope was for many years one of the closest personal and political friends of Mr. Gladstone, and in presenting his report he referred to the earnest desire of that wonderful man for the establishment of such a tribunal in Europe.

To those gentlemen who are inclined to believe that every man who devotes himself to the work of international peace is necessarily a crank and impractical, I would seriously and earnestly invite their

attention to the suggestions submitted at that time by Philip Stanhope, embodied in these four rules that I am going to read to you.

The project submitted was not wild and freakish. It made moderate, conservative proposals, and all for the general good. It was suggested in the report that such a court should recognize the following principles:

1. National sovereignty to remain inalienable and inviolate.
2. The adhesion of every government to the court to be absolutely optional.
3. All adhering states to be on a footing of perfect equality with respect to the international court.
4. The judgment of the court must have the force of an executive sentence.

It is worth while noting in this connection that not only does no government forfeit any of its sovereignty or dignity in such an agreement but, rather, makes it more secure.

The conference at Brussels a year later pushed the great work forward, and the proposals of the Union culminated in the establishment of the Court of The Hague, which Andrew D. White has said is of "vast importance."

The machinery for the rational settlement of international disputes being now provided, and mainly through the work and influence of the Interparliamentary Union, it only remains to educate the public so that the adhesion of all governments will be compelled. That is the work in which the Union is now engaged.

Cremer, the founder, believed that the First Hague Conference, called by the Czar Nicholas, was directly due to the influence that its work had on the mind of that ruler. The Czar had heard of the Union and asked his ministers for more information, at the same time expressing his sympathy and desire to coöperate. When reminded of the fact that it was an organization composed entirely of parliamentarians and that Russia had no representative legislative body, he was compelled to express his sympathy in another manner, and so came about the First Hague Conference.

The Union stands for something definite and practical. It hopes to translate into beneficent facts all the great and just principles of international law. It asks nothing freakish or unpatriotic of its members, who stand absolutely for the preservation of all national dignities, of territory and of sovereignty. It is opposed to war,

although it concedes that sometimes so drastic a remedy may be necessary. It stands for the civilizing influence of religion and the courts. It believes that wars are more hateful and hurtful than private quarrels. Private quarrels and their violent adjustment by the principals is not tolerated in civilized society, and public quarrels, which are a million times more destructive, ought not to be. That, in brief, is the creed of the Interparliamentary Union.

I heard this week that a certain eminent public man has said that he does not believe in the plan put forward by the Secretary of State for the arbitral settlement of international disputes because he regards war as a great civilizer. The Interparliamentary Union was created for the specific purpose of opposing just such civilizing influences as that gentleman stands for, and when light shall have penetrated all dark places, we will hope to have him as a recruit. But, for the time being, we set against his dictum the platform of a greater who said, "Peace on earth to men of good will."

The decrees of such a court will always be respected. It will not require the aid of a single constable, for the greatest of all Powers, universal public opinion, will sustain it.

**THE TOASTMASTER.** Far be it from me to take part in this momentous controversy that has arisen over the merits of our Secretary, but I confess that my sympathies are not with the last speaker. I believe that if he has one quality that is transcendent, it is the selection of speakers at his banquets. Of course, I am unbiased; but I think the last speaker proved it. If we are sorry that the Secretary of State was not present, at least the presence of Mr. Slayden has reduced our regret to the irreducible minimum.

Now, gentlemen, lawyers, some lawyers, a few lawyers, rare lawyers, have occasion to look into history. I do not know why. Perhaps it is because sometimes they are interested in it, or that sometimes they may not have enough actual practice, or there may not be novels on hand; but when they do, they want history as accurately as it can be found, and history that will last as accurate for a long time—I mean for several months or several years, as such things go. Such men have recourse to the splendid works which are either written by Professor Hart, of Harvard University, or inspired under his wise and excellent guidance. Some of you may have been present yesterday when the arid legal discussion as to what mere language meant



was enlightened by his exposition of diplomatic history, and the idea, if I grasped his very comprehensive thought, was that when you are dealing with another fellow on a specific point, you want to know his past history and what he is doing elsewhere. I had that very experience once in an ordinary tort case. It did not seem to me to be a very good case, but I wanted the retainer, yet did not want to lose the case, and finally I said to the client, "You seem to have an exaggerated confidence in your case. What is it based on?" He said, "Well, you know, I think my chance is very good, because I know so much about the plaintiff's private life."

So, I think, it will be very interesting to hear from our most illustrious professor of diplomatic history of that great university, Harvard, Professor Albert Bushnell Hart.

REMARKS OF MR. ALBERT BUSHNELL HART,  
*Professor in Harvard University.*

MR. HART. Fellow members of this honorable Society: Your toastmaster has been good enough to allude to the great service which history renders to the legal profession, meaning, I suppose, that it enables lawyers to discover how many errors have been made by lawyers and by jurists in the past, so that they may repeat them for the benefit of their clients. History is, however, an essential part of all diplomatic proceedings, of all arbitrations, of presentation of cases, and I suppose that the historical mind may be as serviceable to the diplomat as to the ordinary man of affairs. Now, my own knowledge of international law, as a historian, I will confess is meager. As far as I can remember, in my academic career I heard three courses of lectures upon international law; the first from a very estimable man, who knew no international law; the second from a German professor who communicated no international law; and the third from a French professor who happened to be absent in the year that I was so happy as to attend the lectures. I will not, therefore, disturb myself by presenting any additional points of view upon the great questions which we have been deliberating, and which we have finally so completely and so admirably settled.

I should like, however, to say a few words about the absolute necessity of making further appeals within our own country, by bringing to the minds of more people in a stronger and more per-

manent way, the fact that there is such a thing as international law and such a thing as international relations.

Now, of course, as a college professor, I share in and am interested in the efforts made, with a good deal of success, to teach those young men who are interested in it some of the types of international law. Although I have not taught international law, I see before me the faces of several persons who have sat in my classes, but whose later career apparently has not been seriously and unfavorably affected by that circumstance. I see before me a gentleman whose name has already been mentioned, and I have observed, gentlemen, that when the name of Mr. James Brown Scott proceeded from the mouths of the speakers here, that we all involuntarily cringed. Why? Because, as he is the editor of the great series of Classics of International Law, we all fear that he may leave our work out of that important series. But there was a time when I did not cringe, and when James Brown Scott did cringe, when I had it in my power to decide the grave question whether he should receive merely A or A plus upon his work.

I believe it is absolutely necessary that there should be an idea of international law more widely spread throughout the community, and there are several reasons for that; the first being that at present the whole trend of the political thought of this country is toward a fluidity of law, a movement for the initiative, for the referendum, and for constitutional amendments, upon a large scale, both of the National and of the State Constitutions. They all indicate a growing feeling that law is a temporary matter, that laws not only are not eternal, but that they are not very durable. There has been an enormous mass of legislation poured out by the State legislatures year by year, until now nobody believes that any law is very important. As a historian, I might call attention to a fact that international lawyers appear to deduce from the frequency of laws in the past. Their deduction seems to be a thing so perfected that when you find twenty-five successive statutes against the stealing of sheep it would indicate that sheep were not stolen; but the historian knows there will be about twenty-five laws defining the laws of stealing sheep. As a matter of fact, the fact that there is so much law makes no difference. A great conception of the juridical principles bearing between individuals and between nations, founded essentially in the nature of human government in the whole idea of the relation of groups of mankind, ideas which are not predicated on legislation, but on cen-

turies of experience, ideas which must lie at the base of all constant enduring human relation, are ideals which are at the other pole from the fluidity of law of which I have spoken; and unless pains are taken in some way to bring home to the growing youth and middle-aged people of the United States the idea that there is a system of law which is not subject to the initiative or referendum, unless we have a different conception, this country will be plunged into a series of interminable and unpardonable difficulties.

I observe a tendency to extend the principle of impressionism, the cubist method of stating things, to international law. It has been bad enough to see it applied to such great arts as painting and statuary and dancing and foot-ball, but I have seen stated in the public press and elsewhere evidence that the impressionistic tendency has reached the minds of international lawyers. I might instance the suggestion of a statesman that, if there is a treaty in existence that is unfortunate, the way to do is to have the Senate abrogate that treaty. That settles the whole thing. Then you have peace and concord among the nations. Or, if A makes a treaty with B, and A then, of his own volition, changes the circumstances under which that treaty applies, that that constitutes such a change of conditions that he is no longer bound by the treaty.

These aberrations do no harm, except that possibly some people might be influenced, as they are by going to a cubist exhibition, in supposing that those things are pictures.

I have turned over in my mind the hope that perhaps something may be done toward making the fundamental principles of international law better known in our country by systematic and serious study by our youths. I am convinced in my own mind that in our class work we should teach school children twelve or fifteen years of age the fundamental ideas of international relations. We are such a big country; we have so much of the international character in our relations between State and State. As you pass from this District through State after State to the Pacific Coast, you meet with different climates, historical environments, and sometimes very different sets of people, and you have in a sense an international situation within your own boundaries. Oftentimes the idea gets rooted into the child's mind that the United States begins in his ward and ends in the capitol at Washington, that the world begins in his ward and ends at the same point, and that there is no world outside of the boun-

daries of the United States. There is nothing that is more attractive to the cheap demagogue than to dwell upon the immense power and authority of the United States as compared with all other nations. We are a great nation; we are a great Power, and we are bound to be an enormous influence in the world; but we live in a world of great Powers, in which there is no one country that can impose its will without the consent of other Powers, and we might as well recognize it, as our children must do.

Furthermore, something ought to be done to make better known to the youth of America the great laws of juridical science and especially of international jurisprudence.

We have heard references tonight to that great man, Hugo Grotius, and I want to say that if ever there was a cosmopolite, it was Hugo Grotius; if there was ever a man who can be claimed in all civilized countries as a part of the literature of their country, it is that man. Aside from the great church fathers, the apostles, the leaders, the great evangelists, there is no body of men in modern times who have so affected the minds of the civilized community as the great publicists.

Now, Mr. Chairman, I feel like the child who was called upon to give a sentence containing a word and to illustrate it; that is, he was asked to define a figure of speech and give an example. He gave the figure of speech as "He blows his own horn," and his explanation was, "This does not mean that he has a horn; it simply means that he blows it."

The TOASTMASTER. I had no idea that I was such a good prophet, but the professor has lived up to even our most high expectations, and they were of the highest. Any of us who were so unfortunate as not to be nurtured on his books will immediately take them up and begin our education over again, I am sure.

Now, gentlemen, we have had a good time; we have enlightened the nation as we should, we have done our full duty, and I think we will have to leave the solution of some problems of international law until next year. We will then come back to take up any difficulties that may have arisen in the meantime.

I thank you.

## APPENDIX

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### GENERAL TREATY OF PEACE, AMITY, NAVIGATION, AND COMMERCE BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF NEW GRANADA.<sup>1</sup>

*Concluded and signed at Bogotá December 12, 1846; ratifications  
exchanged at Washington June 10, 1848.*

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#### ARTICLE XXXV.

The United States of America and the Republic of New Granada desiring to make as durable as possible, the relations which are to be established between the two parties by virtue of this treaty, have declared solemnly, and do agree to the following points.

1st. For the better understanding of the preceding articles, it is, and has been stipulated, between the high contracting parties, that the citizens, vessels and merchandise of the United States shall enjoy in the ports of New Granada, including those of the part of the Granadian territory generally denominated *Isthmus of Panama* from its southernmost extremity until the boundary of Costa Rica, all the exemptions, privileges and immunities, concerning commerce and navigation, which are now, or may hereafter be enjoyed by Granadian citizens, their vessels and merchandise; and that this equality of favours shall be made to extend to the passengers, correspondence and merchandise of the United States, in their transit across the said territory, from one sea to the other. The Government of New Granada guarantees to the Government of the United States, that the right of way or transit across the *Isthmus of Panama*, upon any modes of communication that now exist, or that may be, hereafter, constructed, shall be open and free to the Government and citizens of the United States, and for the transportation of any articles of produce, manufactures or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens

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<sup>1</sup>Malloy's Treaties and Conventions between the United States and other Powers, 1776-1909, Vol. I, p. 312.

of the United States, or their said merchandise thus passing over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than is under like circumstances levied upon and collected from the Granadian citizens: that any lawful produce, manufactures or merchandise belonging to citizens of the United States thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever; or having paid such duties, they shall be entitled to drawback, upon their exportation: nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages and for the favours they have acquired by the 4th, 5th and 6th articles of this Treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea, may not be interrupted or embarrassed in any future time while this Treaty exists; and in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.

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[Seal.] M. M. MALLARINO.

[Seal.] B. A. BIDLACK.

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CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND GREAT  
BRITAIN, FOR FACILITATING AND PROTECTING THE CONSTRUCTION  
OF A SHIP CANAL BETWEEN THE ATLANTIC AND PACIFIC  
OCEANS, AND FOR OTHER PURPOSES.<sup>1</sup>

*Signed at Washington, April 19, 1850; ratifications exchanged July 4, 1850.*

The United States of America and Her Britannic Majesty, being desirous of consolidating the relations of amity which so happily subsist between them, by setting forth and fixing in a Convention their

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<sup>1</sup>U. S. Treaty Series, No. 122.

views and intentions with reference to any means of communication by Ship Canal, which may be constructed between the Atlantic and Pacific Oceans, by the way of the River San Juan de Nicaragua and either or both of the Lakes of Nicaragua or Managua, to any port or place on the Pacific Ocean,—The President of the United States, has conferred full powers on John M. Clayton, Secretary of State of the United States; and Her Britannic Majesty on the Right Honourable Sir Henry Lytton Bulwer, a Member of Her Majesty's Most Honourable Privy Council, Knight Commander of the Most Honourable Order of the Bath, and Envoy Extraordinary and Minister Plenipotentiary of Her Britannic Majesty to the United States, for the aforesaid purpose; and the said Plenipotentiaries having exchanged their full powers, which were found to be in proper form, have agreed to the following articles.

#### ARTICLE I.

The Governments of the United States and Great Britain hereby declare, that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said Ship Canal; agreeing, that neither will ever erect or maintain any fortifications commanding the same, or in the vicinity thereof, or occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America; nor will either make use of any protection which either affords or may afford, or any alliance which either has or may have, to or with any State or People for the purpose of erecting or maintaining any such fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito Coast or any part of Central America, or of assuming or exercising dominion over the same; nor will the United States or Great Britain take advantage of any intimacy, or use any alliance, connection or influence that either may possess with any State or Government through whose territory the said Canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said Canal, which shall not be offered on the same terms to the citizens or subjects of the other.

#### ARTICLE II.

Vessels of the United States or Great Britain, traversing the said Canal, shall, in case of war between the contracting parties, be ex-

empted from blockade, detention or capture, by either of the belligerents; and this provision shall extend to such a distance from the two ends of the said Canal as may hereafter be found expedient to establish.

### ARTICLE III.

In order to secure the construction of the said Canal, the contracting parties engage that, if any such Canal shall be undertaken upon fair and equitable terms by any parties having the authority of the local Government or Governments, through whose territory the same may pass, then the persons employed in making the said Canal and their property used, or to be used, for that object, shall be protected, from the commencement of the said Canal to its completion, by the Governments of the United States and Great Britain, from unjust detention, confiscation, seizure or any violence whatsoever.

### ARTICLE IV.

The contracting parties will use whatever influence they respectively exercise, with any State, States or Governments possessing, or claiming to possess, any jurisdiction or right over the territory which the said Canal shall traverse, or which shall be near the waters applicable thereto; in order to induce such States, or Governments, to facilitate the construction of the said Canal by every means in their power: and furthermore, the United States and Great Britain agree to use their good offices, wherever or however it may be most expedient, in order to procure the establishment of two free Ports,—one at each end of the said Canal.

### ARTICLE V.

The contracting parties further engage that, when the said Canal shall have been completed, they will protect it from interruption, seizure or unjust confiscation, and that they will guarantee the neutrality thereof, so that the said Canal may forever be open and free, and the capital invested therein, secure. Nevertheless, the Governments of the United States and Great Britain, in according their protection to the construction of the said Canal, and guaranteeing its neutrality and security when completed, always understand that this protection and guarantee are granted conditionally, and may be withdrawn by both Governments, or either Government, if both Governments, or either Government, should deem that the persons, or com-



pany, undertaking or managing the same, adopt or establish such regulations concerning the traffic thereupon, as are contrary to the spirit and intention of this Convention,—either by making unfair discriminations in favor of the commerce of one of the contracting parties over the commerce of the other, or by imposing oppressive exactions or unreasonable tolls upon passengers, vessels, goods, wares, merchandise or other articles. Neither party, however, shall withdraw the aforesaid protection and guarantee, without first giving six months notice to the other.

#### ARTICLE VI.

The contracting parties in this Convention engage to invite every State with which both or either have friendly intercourse, to enter into stipulations with them similar to those which they have entered into with each other; to the end, that all other States may share in the honor and advantage of having contributed to a work of such general interest and importance as the Canal herein contemplated. And the contracting parties likewise agree that, each shall enter into Treaty stipulations with such of the Central American States, as they may deem advisable, for the purpose of more effectually carrying out the great design of this Convention, namely,—that of constructing and maintaining the said Canal as a ship-communication between the two Oceans for the benefit of mankind, on equal terms to all, and of protecting the same; and they, also, agree that, the good offices of either shall be employed, when requested by the other, in aiding and assisting the negotiation of such Treaty stipulations; and, should any differences arise as to right or property over the territory through which the said Canal shall pass—between the States or Governments of Central America,—and such differences should, in any way, impede or obstruct the execution of the said Canal, the Governments of the United States and Great Britain will use their good offices to settle such differences in the manner best suited to promote the interests of the said Canal, and to strengthen the bonds of friendship and alliance which exist between the contracting parties.

#### ARTICLE VII.

It being desirable that no time should be unnecessarily lost in commencing and constructing the said Canal, the Governments of the United States and Great Britain determine to give their support and

encouragement to such persons, or company, as may first offer to commence the same with the necessary capital, the consent of the local authorities, and on such principles as accord with the spirit and intention of this Convention; and if any persons, or company, should already have, with any State through which the proposed Ship-Canal may pass, a contract for the construction of such a Canal as that specified in this Convention,—to the stipulations of which contract neither of the contracting parties in this Convention have any just cause to object,—and the said persons, or company, shall, moreover, have made preparations and expended time, money and trouble on the faith of such contract, it is hereby agreed, that such persons, or company, shall have a priority of claim over every other person, persons or company, to the protection of the Governments of the United States and Great Britain, and be allowed a year, from the date of the exchange of the ratifications of this Convention, for concluding their arrangements, and presenting evidence of sufficient capital subscribed to accomplish the contemplated undertaking; it being understood, that if, at the expiration of the aforesaid period, such persons, or company, be not able to commence and carry out the proposed enterprise, then the Governments of the United States and Great Britain shall be free to afford their protection to any other persons, or company, that shall be prepared to commence and proceed with the construction of the Canal in question.

#### ARTICLE VIII.

The Governments of the United States and Great Britain having not only desired in entering into this Convention, to accomplish a particular object, but, also, to establish a general principle, they hereby agree to extend their protection, by Treaty stipulations, to any other practicable communications, whether by Canal or railway, across the Isthmus which connects North and South America; and, especially, to the interoceanic communications,—should the same prove to be practicable, whether by Canal or railway,—which are now proposed to be established by the way of Tehuantepec, or Panama. In granting, however, their joint protection to any such Canals, or railways, as are by this Article specified, it is always understood by the United States and Great Britain, that the parties constructing or owning the same, shall impose no other charges or conditions of traffic thereupon, than the aforesaid Governments shall approve of, as just and equitable; and, that the same Canals, or railways, being open to the citizens and sub-

jects of the United States and Great Britain on equal terms, shall, also, be open on like terms to the citizens and subjects of every other State which is willing to grant thereto, such protection as the United States and Great Britain engage to afford.

#### ARTICLE IX.

The ratifications of this Convention shall be exchanged at Washington, within six months from this day, or sooner, if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Convention, and have hereunto affixed our seals.

Done, at Washington, the nineteenth day of April, Anno Domini, one thousand eight hundred and fifty.

JOHN M. CLAYTON [L. S.]  
HENRY LYTTON BULWER [L. S.]

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#### CONVENTION BETWEEN THE UNITED STATES AND GREAT BRITAIN TO FACILITATE THE CONSTRUCTION OF A SHIP CANAL TO CON- NECT THE ATLANTIC AND PACIFIC OCEANS.<sup>1</sup>

*Signed at Washington February 5, 1900; ratification consented to by the Senate with amendments, December 20, 1900; ratifications not exchanged.*

[The amendments made by the United States Senate are denoted below by italics, which indicate additions to the treaty, and by brackets, which indicate omitted portions of the treaty.]

The United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, and to that end to remove any objection which may arise out of the Convention of April 19, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that Convention, have for that purpose appointed as their Plenipotentiaries:

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<sup>1</sup>Senate Document No. 160, 56th Cong., 1st Sess.

The President of the United States, John Hay, Secretary of State of the United States of America,

And Her Majesty the Queen of Great Britain and Ireland, Empress of India, the Right Honble. Lord Pauncefoot, G. C. B., G. C. M. G., Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following articles:

#### ARTICLE I.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Convention, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

#### ARTICLE II.

The High Contracting Parties, desiring to preserve and maintain the "general principle" of neutralization established in Article VIII of the Clayton-Bulwer Convention, *which convention is hereby superseded*, adopt, as the basis of such neutralization, the following rules, substantially as embodied in the convention between Great Britain and certain other Powers, signed at Constantinople, October 29, 1888, for the Free Navigation of the Suez Maritime Canal, that is to say:

1. The canal shall be free and open, in time of war as in time of peace, to the vessels of commerce and of war of all nations, on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect of the conditions or charges of traffic, or otherwise.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and

with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

*It is agreed, however, that none of the immediately foregoing conditions and stipulations in sections numbered one, two, three, four, and five of this article shall apply to measures which the United States may find it necessary to take for securing by its own forces the defense of the United States and the maintenance of public order.*

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance and operation of the canal shall be deemed to be part thereof, for the purposes of this Convention, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal.

7. No fortifications shall be erected commanding the canal or the waters adjacent. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

### [ARTICLE III.]

[The High Contracting Parties will, immediately upon the exchange of the ratifications of this Convention, bring it to the notice of the other Powers and invite them to adhere to it.]

### ARTICLE IV.

The present Convention shall be ratified by the President of the United States, by and with the advice and consent of the Senate there-

of, and by Her Britannic Majesty; and the ratifications shall be exchanged at Washington or at London within six months from the date hereof, or earlier if possible.

In faith whereof, the respective Plenipotentiaries, have signed this Convention and thereunto affixed their seals.

Done in duplicate at Washington, the fifth day of February, in the year of Our Lord one thousand nine hundred.

JOHN HAY.  
PAUNCEFOTE.

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CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND, TO FACILITATE THE CONSTRUCTION OF A SHIP CANAL TO CONNECT THE ATLANTIC AND PACIFIC OCEANS.<sup>1</sup>

*Signed at Washington, November 18, 1901; ratifications exchanged February 21, 1902.*

The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, without impairing the "general principle" of neutralization established in Article VIII of that Convention, have for that purpose appointed as their Plenipotentiaries:

The President of the United States, John Hay, Secretary of State of the United States of America;

And His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, the Right Honourable Lord Pauncefote, G. C. B., G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

Who, having communicated to each other their full powers which

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<sup>1</sup>U. S. Treaty Series, No. 401.

were found to be in due and proper form, have agreed upon the following Articles:—

#### ARTICLE I.

The High Contracting Parties agree that the present Treaty shall supersede the afore-mentioned Convention of the 19th April, 1850.

#### ARTICLE II.

It is agreed that the canal may be constructed under the auspices of the Government of the United States, either directly at its own cost, or by gift or loan of money to individuals or Corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present Treaty, the said Government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

#### ARTICLE III.

The United States adopts, as the basis of the neutralization of such ship canal, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the Regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same Rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this Article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all works necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this Treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

#### ARTICLE IV.

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the High Contracting Parties under the present Treaty.

#### ARTICLE V.

The present Treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

IN FAITH WHEREOF the respective Plenipotentiaries have signed this Treaty and thereunto affixed their seals.

DONE in duplicate at Washington, the 18th day of November, in the year of Our Lord one thousand nine hundred and one.

JOHN HAY [SEAL]

PAUNCEFOTE. [SEAL]



CONVENTION RESPECTING THE FREE NAVIGATION OF THE SUEZ  
MARITIME CANAL.<sup>1</sup>

*Signed at Constantinople, October 29, 1888.*

In the Name of Almighty God, Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India; His Majesty the Emperor of Germany, King of Prussia; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of Spain, and in his name the Queen Regent of the Kingdom; the President of the French Republic; His Majesty the King of Italy; His Majesty the King of The Netherlands, Grand Duke of Luxemburg, etc.; His Majesty the Emperor of All the Russias; and His Majesty the Emperor of the Ottomans; wishing to establish, by a Conventional Act, a definite system destined to guarantee at all times, and for all the powers, the free use of the Suez Maritime Canal, and thus to complete the system under which the navigation of this canal has been placed by the Firman of His Imperial Majesty the Sultan, dated the 22nd February, 1866 (2 Zilkádé, 1282), and sanctioning the concessions of His Highness the Khedive, have named as their Plenipotentiaries, that is to say:

(Here follow the names.)

Who, having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE 1. The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

ARTICLE 2. The high contracting parties, recognizing that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of His Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal; which engagements are stipulated in a convention bearing date the 18th March, 1863, containing an *exposé* and four articles.

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<sup>1</sup>SUPPLEMENT to the AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 3, p. 123.

They undertake not to interfere in any way with the security of that canal and its branches, the working of which shall not be exposed to any attempt at obstruction.

ARTICLE 3. The high contracting parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal.

ARTICLE 4. The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed 24 hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of 24 hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power.

ARTICLE 5. In time of war belligerent powers shall not disembark nor embark within the canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

ARTICLE 6. Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.

ARTICLE 7. The powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes).

Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each power.

This right shall not be exercised by belligerents.

ARTICLE 8. The agents in Egypt of the signatory powers of the present treaty shall be charged to watch over its execution. In case of any event threatening the security or the free passage of the canal, they shall meet on the summons of three of their number under the presidency of their Doyen, in order to proceed to the necessary verifications. They shall inform the Khedival Government of the danger which they may have perceived, in order that that government may take proper steps to insure the protection and the free use of the canal. Under any circumstances, they shall meet once a year to take note of the due execution of the treaty.

The last mentioned meetings shall take place under the presidency of a special commissioner nominated for that purpose by the Imperial Ottoman Government. A commissioner of the Khedive may also take part in the meeting, and may preside over it in case of the absence of the Ottoman commissioner.

They shall especially demand the suppression of any work or the dispersion of any assemblage on either bank of the canal, the object or effect of which might be to interfere with the liberty and the entire security of the navigation.

ARTICLE 9. The Egyptian Government shall, within the limits of the powers resulting from the Firmans, and under the conditions provided for in the present treaty, take the necessary measures for insuring the execution of the said treaty.

In case the Egyptian Government should not have sufficient means at its disposal, it shall call upon the Imperial Ottoman Government, which shall take the necessary measures to respond to such appeal; shall give notice thereof to the signatory powers of the Declaration of London of the 17th March, 1885; and shall, if necessary, concert with them on the subject.

The provisions of Articles 4, 5, 7, and 8 shall not interfere with the measures which shall be taken in virtue of the present article.

ARTICLE 10. Similarly, the provisions of Articles 4, 5, 7, and 8, shall not interfere with the measures which His Majesty the Sultan and His Majesty the Khedive, in the name of His Imperial Majesty, and within the limits of the Firmans granted, might find it necessary to take for securing by their own forces the defence of Egypt and the maintenance of public order.

In case His Imperial Majesty the Sultan, or His Highness the

Khedive, should find it necessary to avail themselves of the exceptions for which this article provides, the signatory powers of the Declaration of London shall be notified thereof by the Imperial Ottoman Government.

It is likewise understood that the provisions of the four articles aforesaid shall in no case occasion any obstacle to the measures which the Imperial Ottoman Government may think it necessary to take in order to insure by its own forces the defence of its other possessions situated on the eastern coast of the Red Sea.

ARTICLE 11. The measures which shall be taken in the cases provided for by Articles 9 and 10 of the present treaty shall not interfere with the free use of the canal. In the same cases, the erection of permanent fortifications contrary to the provisions of Article 8 is prohibited.

ARTICLE 12. The high contracting parties, by application of the principle of equality as regards the free use of the canal, a principle which forms one of the bases of the present treaty, agree that none of them shall endeavor to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded. Moreover the rights of Turkey as the territorial power are reserved.

ARTICLE 13. With the exception of the obligations expressly provided by the clauses of the present treaty, the sovereign rights of His Imperial Majesty the Sultan, and the rights and immunities of His Highness the Khedive, resulting from the Firmans, are in no way affected.

ARTICLE 14. The high contracting parties agree that the engagements resulting from the present treaty shall not be limited by the duration of the acts of concession of the Universal Suez Canal Company.

ARTICLE 15. The stipulations of the present treaty shall not interfere with the sanitary measures in force in Egypt.

ARTICLE 16. The high contracting parties undertake to bring the present treaty to the knowledge of the states which have not signed it, inviting them to accede to it.

ARTICLE 17. The present treaty shall be ratified, and the ratifications shall be exchanged at Constantinople within the space of one month, or sooner if possible.

In faith of which the respective plenipotentiaries have signed the present treaty, and have affixed to it the seal of their arms.

Done at Constantinople, the 29th day of the month of October, in the year 1888.

For Great Britain	(L. S.)	W. A. WHITE
Germany	(L. S.)	RADOWITZ
Austria-Hungary	(L. S.)	CALICE
Spain	(L. S.)	MIGUEL FLOREZ Y GARCIA
France	(L. S.)	G. DE MONTEBELLO
Italy	(L. S.)	A. BLANC
Netherlands	(L. S.)	GUS. KEUN
Russia	(L. S.)	NÉLIDOW
Turkey	(L. S.)	M. SAÏD

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CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE  
REPUBLIC OF PANAMA TO INSURE THE CONSTRUCTION OF A SHIP  
CANAL ACROSS THE ISTHMUS OF PANAMA TO CONNECT THE AT-  
LANTIC AND PACIFIC OCEANS.<sup>1</sup>

*Signed at Washington, November 18, 1903; ratifications exchanged  
February 26, 1904.*

The United States of America and the Republic of Panama being desirous to insure the construction of a ship canal across the Isthmus of Panama to connect the Atlantic and Pacific oceans, and the Congress of the United States of America having passed an act approved June 28, 1902, in furtherance of that object, by which the President of the United States is authorized to acquire within a reasonable time the control of the necessary territory of the Republic of Colombia, and the sovereignty of such territory being actually vested in the Republic of Panama, the high contracting parties have resolved for that purpose to conclude a convention and have accordingly appointed as their plenipotentiaries,—

The President of the United States of America, JOHN HAY, Secretary of State, and

The Government of the Republic of Panama, PHILIPPE BUNAU VARILLA, Envoy Extraordinary and Minister Plenipotentiary of the Republic of Panama, thereunto specially empowered by said government, who after communicating with each other their respective full

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<sup>1</sup>U. S. Treaty Series, No. 431.

powers, found to be in good and due form, have agreed upon and concluded the following articles:

#### ARTICLE I.

The United States guarantees and will maintain the independence of the Republic of Panama.

#### ARTICLE II.

The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said Canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the Canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low water mark and extending to and across the Isthmus of Panama into the Pacific ocean to a distance of three marine miles from mean low water mark with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant. The Republic of Panama further grants to the United States in perpetuity the use, occupation and control of any other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said enterprise.

The Republic of Panama further grants in like manner to the United States in perpetuity all islands within the limits of the zone above described and in addition thereto the group of small islands in the Bay of Panama, named Perico, Naos, Culebra and Flamenco.

#### ARTICLE III.

The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the terri-

tory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.

#### ARTICLE IV.

As rights subsidiary to the above grants the Republic of Panama grants in perpetuity to the United States the right to use the rivers, streams, lakes and other bodies of water within its limits for navigation, the supply of water or water-power or other purposes, so far as the use of said rivers, streams, lakes and bodies of water and the waters thereof may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal.

#### ARTICLE V.

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific ocean.

#### ARTICLE VI.

The grants herein contained shall in no manner invalidate the titles or rights of private land holders or owners of private property in the said zone or in or to any of the lands or waters granted to the United States by the provisions of any Article of this treaty, nor shall they interfere with the rights of way over the public roads passing through the said zone or over any of the said lands or waters unless said rights of way or private rights shall conflict with rights herein granted to the United States in which case the rights of the United States shall be superior. All damages caused to the owners of private lands or private property of any kind by reason of the grants contained in this treaty or by reason of the operations of the United States, its agents or employees, or by reason of the construction, maintenance, operation, sanitation and protection of the said Canal or of the works of sanitation and protection herein provided for, shall be appraised and settled by a joint Commission appointed by the Governments of the United States and the Republic of Panama, whose decisions as to such damages shall be final and whose awards as to such damages shall be paid solely by the United States. No

part of the work on said Canal or the Panama railroad or on any auxiliary works relating thereto and authorized by the terms of this treaty shall be prevented, delayed or impeded by or pending such proceedings to ascertain such damages. The appraisal of said private lands and private property and the assessment of damages to them shall be based upon their value before the date of this convention.

#### ARTICLE VII.

The Republic of Panama grants to the United States within the limits of the cities of Panama and Colon and their adjacent harbors and within the territory adjacent thereto the right to acquire by purchase or by the exercise of the right of eminent domain, any lands, buildings, water rights or other properties necessary and convenient for the construction, maintenance, operation and protection of the Canal and of any works of sanitation, such as the collection and disposition of sewage and the distribution of water in the said cities of Panama and Colon, which, in the discretion of the United States may be necessary and convenient for the construction, maintenance, operation, sanitation and protection of the said Canal and railroad. All such works of sanitation, collection and disposition of sewage and distribution of water in the cities of Panama and Colon shall be made at the expense of the United States, and the Government of the United States, its agents or nominees shall be authorized to impose and collect water rates and sewerage rates which shall be sufficient to provide for the payment of interest and the amortization of the principal of the cost of said works within a period of fifty years and upon the expiration of said term of fifty years the system of sewers and water works shall revert to and become the properties of the cities of Panama and Colon respectively, and the use of the water shall be free to the inhabitants of Panama and Colon, except to the extent that water rates may be necessary for the operation and maintenance of said system of sewers and water.

The Republic of Panama agrees that the cities of Panama and Colon shall comply in perpetuity with the sanitary ordinances whether of a preventive or curative character prescribed by the United States and in case the Government of Panama is unable or fails in its duty to enforce this compliance by the cities of Panama and Colon with the sanitary ordinances of the United States the Republic of Panama grants to the United States the right and authority to enforce the same.



The same right and authority are granted to the United States for the maintenance of public order in the cities of Panama and Colon and the territories and harbors adjacent thereto in case the Republic of Panama should not be, in the judgment of the United States, able to maintain such order.

#### ARTICLE VIII.

The Republic of Panama grants to the United States all rights which it now has or hereafter may acquire to the property of the New Panama Canal Company and the Panama Railroad Company as a result of the transfer of sovereignty from the Republic of Colombia to the Republic of Panama over the Isthmus of Panama and authorizes the New Panama Canal Company to sell and transfer to the United States its rights, privileges, properties and concessions as well as the Panama Railroad and all the shares or part of the shares of that company; but the public lands situated outside of the zone described in Article II of this treaty now included in the concessions to both said enterprises and not required in the construction or operation of the Canal shall revert to the Republic of Panama except any property now owned by or in the possession of said companies within Panama or Colon or the ports or terminals thereof.

#### ARTICLE IX.

The United States agrees that the ports at either entrance of the Canal and the waters thereof, and the Republic of Panama agrees that the towns of Panama and Colon shall be free for all time so that there shall not be imposed or collected custom house tolls, tonnage, anchorage, lighthouse, wharf, pilot, or quarantine dues or any other charges or taxes of any kind upon any vessel using or passing through the Canal or belonging to or employed by the United States, directly or indirectly, in connection with the construction, maintenance, operation, sanitation and protection of the main Canal, or auxiliary works, or upon the cargo, officers, crew, or passengers of any such vessels, except such tolls and charges as may be imposed by the United States for the use of the Canal and other works, and except tolls and charges imposed by the Republic of Panama upon merchandise destined to be introduced for the consumption of the rest of the Republic of Panama, and upon vessels touching at the ports of Colon and Panama and which do not cross the Canal.

The Government of the Republic of Panama shall have the right to establish in such ports and in the towns of Panama and Colon such houses and guards as it may deem necessary to collect duties on importations destined to other portions of Panama and to prevent contraband trade. The United States shall have the right to make use of the towns and harbors of Panama and Colon as places of anchorage, and for making repairs, for loading, unloading, depositing, or transshipping cargoes either in transit or destined for the service of the Canal and for other works pertaining to the Canal.

#### ARTICLE X.

The Republic of Panama agrees that there shall not be imposed any taxes, national, municipal, departmental, or of any other class, upon the Canal, the railways and auxiliary works, tugs and other vessels employed in the service of the Canal, store houses, work shops, offices, quarters for laborers, factories of all kinds, warehouses, wharves, machinery and other works, property, and effects appertaining to the Canal or railroad and auxiliary works, or their officers or employees, situated within the cities of Panama and Colon, and that there shall not be imposed contributions or charges of a personal character of any kind upon officers, employees, laborers, and other individuals in the service of the Canal and railroad and auxiliary works.

#### ARTICLE XI.

The United States agrees that the official dispatches of the Government of the Republic of Panama shall be transmitted over any telegraph and telephone lines established for canal purposes and used for public and private business at rates not higher than those required from officials in the service of the United States.

#### ARTICLE XII.

The Government of the Republic of Panama shall permit the immigration and free access to the lands and workshops of the Canal and its auxiliary works of all employees and workmen of whatever nationality under contract to work upon or seeking employment upon or in any wise connected with the said Canal and its auxiliary works, with their respective families, and all such persons shall be free and exempt from the military service of the Republic of Panama.

## ARTICLE XIII.

The United States may import at any time into the said zone and auxiliary lands, free of customs duties, imposts, taxes, or other charges, and without any restrictions, any and all vessels, dredges, engines, cars, machinery, tools, explosives, materials, supplies, and other articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families. If any such articles are disposed of for use outside of the zone and auxiliary lands granted to the United States and within the territory of the Republic, they shall be subject to the same import or other duties as like articles imported under the laws of the Republic of Panama.

## ARTICLE XIV.

As the price or compensation for the rights, powers and privileges granted in this convention by the Republic of Panama to the United States, the Government of the United States agrees to pay to the Republic of Panama the sum of ten million dollars (\$10,000,000) in gold coin of the United States on the exchange of the ratification of this convention and also an annual payment during the life of this convention of two hundred and fifty thousand dollars (\$250,000) in like gold coin, beginning nine years after the date aforesaid.

The provisions of this Article shall be in addition to all other benefits assured to the Republic of Panama under this convention.

But no delay or difference of opinion under this Article or any other provisions of this treaty shall affect or interrupt the full operation and effect of this convention in all other respects.

## ARTICLE XV.

The joint commission referred to in Article VI shall be established as follows:

The President of the United States shall nominate two persons and the President of the Republic of Panama shall nominate two persons and they shall proceed to a decision; but in case of disagreement of the Commission (by reason of their being equally divided in conclusion) an umpire shall be appointed by the two Governments

who shall render the decision. In the event of the death, absence, or incapacity of a Commissioner or Umpire, or of his omitting, declining or ceasing to act, his place shall be filled by the appointment of another person in the manner above indicated. All decisions by a majority of the Commission or by the umpire shall be final.

#### ARTICLE XVI.

The two Governments shall make adequate provision by future agreement for the pursuit, capture, imprisonment, detention and delivery within said zone and auxiliary lands to the authorities of the Republic of Panama of persons charged with the commitment of crimes, felonies or misdemeanors without said zone and for the pursuit, capture, imprisonment, detention and delivery without said zone to the authorities of the United States of persons charged with the commitment of crimes, felonies and misdemeanors within said zone and auxiliary lands.

#### ARTICLE XVII.

The Republic of Panama grants to the United States the use of all the ports of the Republic open to commerce as places of refuge for any vessels employed in the Canal enterprise, and for all vessels passing or bound to pass through the Canal which may be in distress and be driven to seek refuge in said ports. Such vessels shall be exempt from anchorage and tonnage dues on the part of the Republic of Panama.

#### ARTICLE XVIII.

The Canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section I of Article three of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

#### ARTICLE XIX.

The Government of the Republic of Panama shall have the right to transport over the Canal its vessels and its troops and munitions of war in such vessels at all times without paying charges of any kind. The exemption is to be extended to the auxiliary railway for the transportation of persons in the service of the Republic of Panama, or of

the police force charged with the preservation of public order outside of said zone, as well as to their baggage, munitions of war and supplies.

#### ARTICLE XX.

If by virtue of any existing treaty in relation to the territory of the Isthmus of Panama, whereof the obligations shall descend or be assumed by the Republic of Panama, there may be any privilege or concession in favor of the Government or the citizens and subjects of a third power relative to an interoceanic means of communication which in any of its terms may be incompatible with the terms of the present convention, the Republic of Panama agrees to cancel or modify such treaty in due form, for which purpose it shall give to the said third power the requisite notification within the term of four months from the date of the present convention, and in case the existing treaty contains no clause permitting its modifications or annulment, the Republic of Panama agrees to procure its modification or annulment in such form that there shall not exist any conflict with the stipulations of the present convention.

#### ARTICLE XXI.

The rights and privileges granted by the Republic of Panama to the United States in the preceding Articles are understood to be free of all anterior debts, liens, trusts, or liabilities, or concessions or privileges to other Governments, corporations, syndicates or individuals, and consequently, if there should arise any claims on account of the present concessions and privileges or otherwise, the claimants shall resort to the Government of the Republic of Panama and not to the United States for any indemnity or compromise which may be required.

#### ARTICLE XXII.

The Republic of Panama renounces and grants to the United States the participation to which it might be entitled in the future earnings of the Canal under Article XV of the concessionary contract with Lucien N. B. Wyse now owned by the New Panama Canal Company and any and all other rights or claims of a pecuniary nature arising under or relating to said concession, or arising under or relating to the concessions to the Panama Railroad Company or any extension or modification thereof; and it likewise renounces, confirms and grants

to the United States, now and hereafter, all the rights and property reserved in the said concessions which otherwise would belong to Panama at or before the expiration of the terms of ninety-nine years of the concessions granted to or held by the above mentioned party and companies, and all right, title and interest which it now has or may hereafter have, in and to the lands, canal, works, property and rights held by the said companies under said concessions or otherwise, and acquired or to be acquired by the United States from or through the New Panama Canal Company, including any property and rights which might or may in the future either by lapse of time, forfeiture or otherwise, revert to the Republic of Panama under any contracts or concessions, with said Wyse, the Universal Panama Canal Company, the Panama Railroad Company and the New Panama Canal Company.

The aforesaid rights and property shall be and are free and released from any present or reversionary interest in or claims of Panama and the title of the United States thereto upon consummation of the contemplated purchase by the United States from the New Panama Canal Company, shall be absolute, so far as concerns the Republic of Panama, excepting always the rights of the Republic specifically secured under this treaty.

#### ARTICLE XXIII.

If it should become necessary at any time to employ armed forces for the safety or protection of the Canal, or of the ships that make use of the same, or the railways and auxiliary works, the United States shall have the right, at all times and in its discretion, to use its police and its land and naval forces or to establish fortifications for these purposes.

#### ARTICLE XXIV.

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

If the Republic of Panama shall hereafter enter as a constituent into any other Government or into any union or confederation of states, so as to merge her sovereignty or independence in such Gov-

ernment, union or confederation, the rights of the United States under this convention shall not be in any respect lessened or impaired.

#### ARTICLE XXV.

For the better performance of the engagements of this convention and to the end of the efficient protection of the Canal and the preservation of its neutrality, the Government of the Republic of Panama will sell or lease to the United States lands adequate and necessary for naval or coaling stations on the Pacific coast and on the western Caribbean coast of the Republic at certain points to be agreed upon with the President of the United States.

#### ARTICLE XXVI.

This convention when signed by the Plenipotentiaries of the Contracting Parties shall be ratified by the respective Governments and the ratifications shall be exchanged at Washington at the earliest date possible.

In faith whereof the respective Plenipotentiaries have signed the present convention in duplicate and have hereunto affixed their respective seals.

Done at the City of Washington the 18th day of November in the year of our Lord nineteen hundred and three.

JOHN HAY [SEAL]  
P. BUNAU VARILLA [SEAL]

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CHARGÉ D'AFFAIRES INNES TO THE SECRETARY OF STATE.<sup>1</sup>

BRITISH EMBASSY,  
KINEO, MAINE,

SIR,

*July 8, 1912.*

The attention of His Majesty's Government has been called to the various proposals that have from time to time been made for the purpose of relieving American shipping from the burden of the tolls to be levied on vessels passing through the Panama Canal, and these proposals together with the arguments that have been used to support them have been carefully considered with a view to the bearing on them of the provisions of the treaty between the United States and Great Britain of November 18th, 1901.

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<sup>1</sup>Pamphlet printed by Department of State, Washington, D. C.

The proposals may be summed up as follows:—

- (1). To exempt all American shipping from the tolls,
- (2). To refund to all American ships the tolls which they may have paid,
- (3). To exempt American ships engaged in the coastwise trade,
- (4). To repay the tolls to American ships engaged in the coastwise trade.

The proposal to exempt all American shipping from the payment of the tolls, would, in the opinion of His Majesty's Government, involve an infraction of the treaty, nor is there, in their opinion any difference in principle between charging tolls only to refund them and remitting tolls altogether. The result is the same in either case, and the adoption of the alternative method of refunding the tolls in preference to that of remitting them, while perhaps complying with the letter of the treaty, would still contravene its spirit.

It has been argued that a refund of the tolls would merely be equivalent to a subsidy and that there is nothing in the Hay-Pauncefote treaty which limits the right of the United States to subsidize its shipping. It is true that there is nothing in that treaty to prevent the United States from subsidizing its shipping and if it granted a subsidy His Majesty's Government could not be in a position to complain. But there is a great distinction between a general subsidy, either to shipping at large or to shipping engaged in any given trade, and a subsidy calculated particularly with reference to the amount of user of the Canal by the subsidized lines or vessels. If such a subsidy were granted it would not, in the opinion of His Majesty's Government, be in accordance with the obligations of the Treaty.

As to the proposal that exemption shall be given to vessels engaged in the coastwise trade, a more difficult question arises. If the trade should be so regulated as to make it certain that only bona-fide coastwise traffic which is reserved for United States vessels would be benefited by this exemption, it may be that no objection could be taken. But it appears to my government that it would be impossible to frame regulations which would prevent the exemption from resulting, in fact, in a preference to United States shipping and consequently in an infraction of the Treaty.

I have the honor to be,

With the highest consideration,

Sir,

Your most obedient, humble Servant,

A. MITCHELL INNES.



AN ACT TO PROVIDE FOR THE OPENING, MAINTENANCE, PROTECTION,  
AND OPERATION OF THE PANAMA CANAL, AND THE SANITATION  
AND GOVERNMENT OF THE CANAL ZONE.<sup>1</sup>

*Approved August 24, 1912.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the zone of land and land under water of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal now being constructed thereon, which zone begins in the Caribbean Sea three marine miles from the mean low-water mark and extends to and across the Isthmus of Panama into the Pacific Ocean to the distance of three marine miles from mean low-water mark, excluding therefrom the cities of Panama and Colon and their adjacent harbors located within said zone, as excepted in the treaty with the Republic of Panama dated November eighteenth, nineteen hundred and three, but including all islands within said described zone, and in addition thereto the group of islands in the Bay of Panama named Perico, Naos, Culebra, and Flamenco, and any lands and waters outside of said limits above described which are necessary or convenient or from time to time may become necessary or convenient for the construction, maintenance, operation, sanitation, or protection of the said canal or of any auxiliary canals, lakes, or other works necessary or convenient for the construction, maintenance, operation, sanitation, or protection of said canal, the use, occupancy, or control whereof were granted to the United States by the treaty between the United States and the Republic of Panama, the ratifications of which were exchanged on the twenty-sixth day of February, nineteen hundred and four, shall be known and designated as the Canal Zone, and the canal now being constructed thereon shall hereafter be known and designated as the Panama Canal. The President is authorized, by treaty with the Republic of Panama, to acquire any additional land or land under water not already granted, or which was excepted from the grant, that he may deem necessary for the operation, maintenance, sanitation, or protection of the Panama Canal, and to exchange any land or land under water not deemed necessary for such purposes for other land or land under water which may be deemed necessary for such purposes, which additional land or land under water so acquired shall become part of the Canal Zone.

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<sup>1</sup>Public, No. 337 [H. R. 21969].

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established.

SEC. 3. That the President is authorized to declare by Executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid treaty with the Republic of Panama, or such modification of such treaty as may hereafter be made.

SEC. 4. That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year.

All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. That upon the completion of the Panama Canal the President shall cause the same to be officially and formally opened for use and operation.

Before the completion of the canal, the Commission of Arts may make report to the President of their recommendation regarding the artistic character of the structures of the canal, such report to be transmitted to Congress.

Sec. 5. That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided*, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States. That section forty-one hundred and thirty-two of the Revised Statutes is hereby amended to read as follows:

"SEC. 4132. Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Steamboat Inspection Service as safe to carry dry and perishable cargo, not more than five years old at the time they apply for registry, wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutuila, being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing

directors of which shall be citizens of the United States, and no others, may be registered as directed in this title. Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade: *Provided*, That a foreign-built yacht, pleasure boat, or vessel not used or intended to be used for trade admitted to American registry pursuant to this section shall not be exempt from the collection of ad valorem duty provided in section thirty-seven of the Act approved August fifth, nineteen hundred and nine, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes.' That all materials of foreign production which may be necessary for the construction or repair of vessels built in the United States and all such materials necessary for the building or repair of their machinery and all articles necessary for their outfit and equipment may be imported into the United States free of duty under such regulations as the Secretary of the Treasury may prescribe: *Provided further*, That such vessels so admitted under the provisions of this section may contract with the Postmaster General under the Act of March third, eighteen hundred and ninety-one, entitled 'An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce,' so long as such vessels shall in all respects comply with the provisions and requirements of said Act."

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents. The President is authorized to make and from time to

time amend regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the canal or the approaches thereto through the adjacent waters.

Such regulations shall provide for prompt adjustment by agreement and immediate payment of claims for damages which may arise from injury to vessels, cargo, or passengers from the passing of vessels through the locks under the control of those operating them under such rules and regulations. In case of disagreement suit may be brought in the district court of the Canal Zone against the governor of the Panama Canal. The hearing and disposition of such cases shall be expedited and the judgment shall be immediately paid out of any moneys appropriated or allotted for canal operation.

The President shall provide a method for the determination and adjustment of all claims arising out of personal injuries to employees thereafter occurring while directly engaged in actual work in connection with the construction, maintenance, operation, or sanitation of the canal or of the Panama Railroad, or of any auxiliary canals, locks, or other works necessary and convenient for the construction, maintenance, operation, or sanitation of the canal, whether such injuries result in death or not, and prescribe a schedule of compensation therefor, and may revise and modify such method and schedule at any time; and such claims, to the extent they shall be allowed on such adjustment, if allowed at all, shall be paid out of the moneys hereafter appropriated for that purpose or out of the funds of the Panama Railroad Company, if said company was responsible for said injury, as the case may require. And after such method and schedule shall be provided by the President, the provisions of the Act entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," approved May thirtieth, nineteen hundred and eight, and of the Act entitled "An Act relating to injured employees on the Isthmian Canal," approved February twenty-fourth, nineteen hundred and nine, shall not apply to personal injuries thereafter received and claims for which are subject to determination and adjustment as provided in this section.

SEC. 6. That the President is authorized to cause to be erected, maintained, and operated, subject to the International Convention

and the Act of Congress to regulate radio-communication, at suitable places along the Panama Canal and the coast adjacent to its two terminals, in connection with the operation of said canal, such wireless telegraphic installations as he may deem necessary for the operation, maintenance, sanitation, and protection of said canal, and for other purposes. If it is found necessary to locate such installations upon territory of the Republic of Panama, the President is authorized to make such agreement with said Government as may be necessary, and also to provide for the acceptance and transmission, by said system, of all private and commercial messages, and those of the Government of Panama, on such terms and for such tolls as the President may prescribe: *Provided*, That the messages of the Government of the United States and the departments thereof, and the management of the Panama Canal, shall always be given precedence over all other messages. The President is also authorized, in his discretion, to enter into such operating agreements or leases with any private wireless company or companies as may best insure freedom from interference with the wireless telegraphic installations established by the United States. The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall annually be covered into the Treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress.

SEC. 7. That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with

the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. The President is authorized to determine or cause to be determined what towns shall exist in the Canal Zone and subdivide and from time to time resubdivide said Canal Zone into subdivisions, to be designated by name or number, so that there shall be situated one town in each subdivision, and the boundaries of each subdivision shall be clearly defined. In each town there shall be a magistrate's court with exclusive original jurisdiction coextensive with the subdivision in which it is situated of all civil cases in which the principal sum claimed does not exceed three hundred dollars, and all criminal cases wherein the punishment that may be imposed shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days, or both, and all violations of police regulations and ordinances and all actions involving possession or title to personal property or the forcible entry and detainer of real estate. Such magistrates shall also hold preliminary investigations in charges of felony and offenses under section ten of this Act, and commit or bail in bailable cases to the district court. A sufficient number of magistrates and constables, who must be citizens of the United States, to conduct the business of such courts, shall be appointed by the governor of the Panama Canal for terms of four years and until their successors are appointed and qualified, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same. The rules governing said courts and prescribing the duties of said magistrates and constables, oaths and bonds, the times and places of holding such courts, the disposition of fines, costs, forfeitures, enforcements of judgments, providing for appeals therefrom to the district court, and the disposition, treatment, and pardon of convicts shall be established by order of the President. The governor of the Panama Canal shall appoint all notaries public, prescribe their powers and duties, their official seal, and the fees to be charged and collected by them.

SEC. 8. That there shall be in the Canal Zone one district court with two divisions, one including Balboa and the other including

Cristobal; and one district judge of the said district, who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States district judges and the United States district courts, and the procedure and practice shall also be the same. The district court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. Said judge shall provide for the selection, summoning, serving, and compensation of jurors from among the citizens of the United States, to be subject to jury duty in either division of such district, and a jury shall be had in any criminal case or civil case at law originating in said court on the demand of either party. There shall be a district attorney and a marshal for said district. It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the governor of the Panama Canal on all legal questions touching the operation of the canal and the administration of civil affairs. It shall be the duty of the marshal to execute all process of the court, preserve order therein, and do all things incident to the office of marshal. The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President. The district judge shall be



entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service, shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum.

SEC. 9. That the records of the existing courts and all causes, proceedings, and criminal prosecutions pending therein as shown by the dockets thereof, except as herein otherwise provided, shall immediately upon the organization of the courts created by this Act be transferred to such new courts having jurisdiction of like cases, be entered upon the dockets thereof, and proceed as if they had originally been brought therein, whereupon all the existing courts, except the supreme court of the Canal Zone, shall cease to exist. The President may continue the supreme court of the Canal Zone and retain the judges thereof in office for such time as to him may seem necessary to determine finally any causes and proceedings which may be pending therein. All laws of the Canal Zone imposing duties upon the clerks or ministerial officers of existing courts shall apply and impose such duties upon the clerks and ministerial officers of the new courts created by this Act having jurisdiction of like cases, matters, and duties.

All existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice and procedure in the new courts.

The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And

such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States.

SEC. 10. That after the Panama Canal shall have been completed and opened for operation the governor of the Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary. Any person violating any of such rules or regulations shall be guilty of a misdemeanor, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding a year, or both, in the discretion of the court. It shall be unlawful for any person, by any means or in any way, to injure or obstruct, or attempt to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto. Any person violating this provision shall be guilty of a felony, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both, in the discretion of the court. If the act shall cause the death of any person within a year and a day thereafter, the person so convicted shall be guilty of murder and shall be punished accordingly.

SEC. 11. That section five of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof, as follows:

"From and after the first day of July, nineteen hundred and fourteen. it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid

does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said

canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled, "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

That section six of said Act to regulate commerce, as heretofore amended, is hereby amended by adding a new paragraph at the end thereof, as follows:

When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

The commission shall have full authority to determine the

terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water.

(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country.

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

SEC. 12. That all laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they may not be in conflict with or superseded by any special

treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States.

SEC. 13. That in time of war in which the United States shall be engaged, or when, in the opinion of the President, war is imminent, such officer of the Army as the President may designate shall, upon the order of the President, assume and have exclusive authority and jurisdiction over the operation of the Panama Canal and all of its adjuncts, appendants, and appurtenances, including the entire control and government of the Canal Zone, and during a continuance of such condition the governor of the Panama Canal shall, in all respects and particulars as to the operation of such Panama Canal, and all duties, matters, and transactions affecting the Canal Zone, be subject to the order and direction of such officer of the Army.

SEC. 14. That this Act shall be known as, and referred to as, the Panama Canal Act, and the right to alter, amend, or repeal any or all of its provisions or to extend, modify, or annul any rule or regulation made under its authority is expressly reserved.

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#### MEMORANDUM TO ACCOMPANY THE PANAMA CANAL ACT.

[By the President of the United States.]

In signing the Panama Canal bill, I wish to leave this memorandum. The bill is admirably drawn for the purpose of securing the proper maintenance, operation and control of the canal, and the government of the Canal Zone, and for the furnishing, to all the patrons of the canal, through the Government, of the requisite docking facilities and the supply of coal and other shipping necessities. It is absolutely necessary to have the bill passed at this session, in order that the capital of the world engaged in the preparation of ships to use the canal may know in advance the conditions under which the traffic is to be carried on through this waterway.

I wish to consider the objections to the bill in the order of their importance.

First, the bill is objected to because it is said to violate the Hay-Pauncefote Treaty in discriminating in favor of the coastwise trade of the United States, by providing that no tolls shall be charged to vessels engaged in that trade passing through the canal. This is the subject of a protest by the British Government.

The British protest involves the right of the Congress of the United States to regulate its domestic and foreign commerce in such manner as to the Congress may seem wise, and specifically the protest challenges the right of the Congress to exempt American shipping from the payment of tolls for the use of the Panama Canal, or to refund to such American ships the tolls which they may have paid, and this without regard to the trade in which such ships are employed, whether coastwise or foreign. The protest states "the proposal to exempt all American shipping from the payment of the tolls would in the opinion of His Majesty's Government, involve an infraction of the treaty (Hay-Pauncefote), nor is there, in their opinion, any difference in principle between charging tolls only to refund them and remitting tolls altogether. The result is the same in either case and the adoption of the alternative method of refunding tolls in preference of remitting them, while perhaps complying with the letter of the treaty, would still controvert its spirit." The provision of the Hay-Pauncefote Treaty involved is contained in Article Third, which provides:

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

Then follow five other rules to be observed by other nations to make neutralization effective, the observance of which is the condition for the privilege of using the canal.

In view of the fact that the Panama Canal is being constructed by the United States wholly at its own cost, upon territory ceded to it by the Republic of Panama for that purpose, and that unless

it has restricted itself the United States enjoys absolute rights of ownership and control, including the right to allow its own commerce the use of the canal upon such terms as it sees fit, the sole question is, has the United States in the language above quoted from the Hay-Pauncefote Treaty deprived itself of the exercise of the right to pass its own commerce free or to remit tolls collected for the use of the canal.

It will be observed that the rules specified in Article 3 of the treaty were adopted by the United States for a specific purpose, namely, as the basis of the neutralization of the canal and for no other purpose. The Article is a declaration of policy by the United States that the canal shall be neutral, that the attitude of this Government towards the commerce of the world is that all nations will be treated alike and no discrimination made by the United States against any one of them observing the rules adopted by the United States. The right to the use of the canal and to equality of treatment in the use depends upon the observance of the conditions of the use by the nations to whom we extended that privilege. The privileges of all nations to whom we extended the use upon the observance of these conditions were to be equal to that extended to any one of them which observed the conditions. In other words, it was a conditional favored-nation treatment, the measure of which in the absence of express stipulation to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations.

Thus it is seen that the rules are but a basis of neutralization, intended to effect the neutrality which the United States was willing should be the character of the canal and not intended to limit or hamper the United States in the exercise of its sovereign power to deal with its own commerce using its own canal in whatsoever manner it saw fit.

If there is no "difference in principle between the United States charging tolls to its own shipping only to refund them and remitting tolls altogether," as the British protest declares, then the irresistible conclusion is that the United States, although it owns, controls and has paid for the canal is restricted by treaty from aiding its own commerce in the way that all the other nations of the world may freely do. It would scarcely be claimed that the setting out in a treaty between the United States and Great Britain of certain rules adopted by the United States as the basis of the neutralization of



the canal would bind any government to do or refrain from doing anything other than the things required by the rules to insure the privilege of use and freedom from discrimination. Since the rules do not provide as a condition for the privilege of use upon equal terms with other nations that other nations desiring to build up a particular trade involving the use of the canal shall not either directly agree to pay the tolls or to refund to its ships the tolls collected for the use of the canal, it is evident that the treaty does not affect that inherent, sovereign right, unless, which is not likely, it be claimed that the promulgation by the United States of these rules insuring all nations against its discrimination, would authorize the United States to pass upon the action of other nations and require that no one of them should grant to its shipping larger subsidies or more liberal inducement for the use of the canal than were granted by others. In other words, that the United States has the power to equalize the practice of other nations in this regard.

If it is correct then to assume that there is nothing in the Hay-Pauncefote Treaty preventing Great Britain and the other nations from extending such favors as they may see fit to their shipping using the canal, and doing it in the way they see fit, and if it is also right to assume that there is nothing in the treaty that gives the United States any supervision over, or right to complain of such action, then the British protest leads to the absurd conclusion that this Government in constructing the canal, maintaining the canal, and defending the canal, finds itself shorn of its right to deal with its own commerce in its own way, while all other nations using the canal in competition with American commerce enjoy that right and power unimpaired.

The British protest, therefore, is a proposal to read into the treaty a surrender by the United States of its right to regulate its own commerce in its own way and by its own methods, a right which neither Great Britain herself, nor any other nation that may use the canal, has surrendered or proposes to surrender. The surrender of this right is not claimed to be in terms. It is only to be inferred from the fact that the United States has conditionally granted to all the nations the use of the canal without discrimination by the United States between the grantees, but as the treaty leaves all nations desiring to use the canal with full right to deal with their own vessels as they see fit, the United States would only be discriminating

against itself if it were to recognize the soundness of the British contention.

The bill here in question does not positively do more than to discriminate in favor of the coastwise trade, and the British protest seems to recognize a distinction between such exemption and the exemption of American vessels engaged in foreign trade. In effect, of course, there is a substantial and practical difference. The American vessels in foreign trade come into competition with vessels of other nations in that same trade, while foreign vessels are forbidden to engage in the American coastwise trade. While the bill here in question seems to vest the President with discretion to discriminate in fixing tolls in favor of American ships and against foreign ships engaged in foreign trade, within the limitation of the range from fifty cents a ton to \$1.25 a net ton, there is nothing in the act to compel the President to make such a discrimination. It is not, therefore, necessary to discuss the policy of such discrimination until the question may arise in the exercise of the President's discretion.

The policy of exempting the coastwise trade from all tolls really involves the question of granting a Government subsidy for the purpose of encouraging that trade in competition with the trade of the trans-continental railroads. I approve this policy. It is in accord with the historical course of the Government in giving government aid to the construction of the trans-continental roads. It is now merely giving Government aid to a means of transportation that competes with those trans-continental roads.

Second, the bill permits the registry of foreign-built vessels as vessels of the United States for foreign trade, and it also permits the admission, without duty, of materials for the construction and repair of vessels in the United States. This is objected to on the ground that it will interfere with the ship-building interests of the United States. I can not concur in this view. The number of vessels of the United States engaged in foreign trade is so small that the work done by the present shipyards is almost wholly that of constructing vessels for the coastwise trade or government vessels. In other words, there is substantially no business for building ships in the foreign trade in the shipyards of the United States which will be injured by this new provision. It is hoped that this registry of foreign-built ships in American foreign trades will prove to be a method of increasing our foreign shipping. The experiment will hurt

no interest of ours, and we can observe its operation. If it proves to extend our commercial flag to the high seas, it will supply a long felt want.

Third. Section 5 of the Interstate Commerce Act is amended by forbidding railroad companies to own, lease, operate, control or have any interest in any common carrier by water operated through the Panama Canal, with which such railroad or other carrier does or may compete for traffic. I have twice recommended such restriction as to the Panama Canal. It was urged upon me that the Interstate Commerce Commission might control the trade so as to prevent an abuse from the joint ownership of railroads and of Panama steamships competing with each other, and, therefore, that this radical provision was not necessary. Conference with the Interstate Commerce Commission, however, satisfied me that such control would not be as effective as this restriction. The difficulty is that the interest of the railroad company is so much larger in its railroad and in the maintenance of its railroad rates than in making a profit out of the steamship line that it can afford temporarily to run its vessels for nearly nothing, in order to drive out of the business, independent steamship lines and thus obtain complete control of the shipping in the trade through the canal and regulate the rates according to the interest of the railroad company. Jurisdiction is conferred on the Interstate Commerce Commission finally to determine the question of fact as to the competition or possibility of competition of the water carrier with the railroad, and this may be done in advance of any investment of capital.

Fourth. The effect of the amendment of Section 5 of the Interstate Commerce Act also is extended so as to make it unlawful for railroad companies owning or controlling lines of steamships in any other part of the jurisdiction of the United States to continue to do so, and as to such railroad companies and such water carriers, the Interstate Commerce Commission is given the duty and power not only finally to determine the question of competition or possibility of competition, but also to determine "that the specified service by water is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration"; and if it finds this to be the case, to extend the time during which such service by water may

continue beyond the date fixed in the act for its first operation, to wit, July 1, 1914. Whenever the time is extended, then the water carrier, its rates and schedules and practices are brought within the control of the Interstate Commerce Commission. How far it is within the power of Congress to delegate to the Interstate Commerce Commission such wide discretion, it is unnecessary now to discuss. There is ample time between now and the time of this provision of the act's going into effect to have the matter examined by the Supreme Court, or to change the form of the legislation, should it be deemed necessary. Certainly the suggested invalidity of this section, if true, would not invalidate the entire act, the remainder of which may well stand without regard to this provision.

Fifth. The final objection is to a provision which prevents the owner of any steamship who is guilty of violating the anti-trust law from using the canal. It is quite evident that this section applies only to those vessels engaged in the trade in which there is a monopoly contrary to our Federal statute, and it is a mere injunctive process against the continuance of such monopolistic trade. It adds the penalty of denying the use of the canal to a person or corporation violating the anti-trust law. It may have some practical operation where the business monopolized is transportation by ships, but it does not become operative to prevent the use of the canal until the decree of the court shall have established the fact of the guilt of the owner of the vessel. While the penalties of the anti-trust law seem to me to be quite sufficient already, I do not know that this new remedy against a particular kind of a trust may not sometimes prove useful.

In a message sent to Congress, after this bill had passed both Houses, I ventured to suggest a possible amendment by which all persons, and especially all British subjects, who felt aggrieved by the provisions of the bill, on the ground that they are in violation of the Hay-Pauncefote Treaty, might try that question in the Supreme Court of the United States. I think this would have satisfied those who oppose the view which Congress evidently entertains of the treaty, and might avoid the necessity for either diplomatic negotiation or further decision by an arbitral tribunal. Congress, however, has not thought it wise to accept the suggestion, and, therefore, I must proceed in the view, which I have expressed and am convinced is the correct one, as to the proper construction of the treaty

and the limitations which it imposes upon the United States. I do not find that the bill here in question violates those limitations.

On the whole, I believe the bill to be one of the most beneficial that has passed this or any other Congress, and I find no reason in the objections made to the bill which should lead me to delay until another session of Congress, provisions that are imperatively needed now in order that due preparation by the world may be made for the opening of the canal.

WM. H. TAFT.

THE WHITE HOUSE, *August 24, 1912.*

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PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES PRESCRIBING PANAMA CANAL TOLL RATES.<sup>1</sup>

I, WILLIAM HOWARD TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Act of Congress, approved August twenty-fourth, nineteen hundred and twelve, to provide for the opening, maintenance, protection and operation of the Panama Canal and the sanitation and government of the Canal Zone, do hereby prescribe and proclaim the following rates of toll to be paid by vessels using the Panama Canal:

1. On merchant vessels carrying passengers or cargo one dollar and twenty cents (\$1.20) per net vessel ton—each one hundred (100) cubic feet—of actual earning capacity.
2. On vessels in ballast without passengers or cargo forty (40) per cent less than the rate of tolls for vessels with passengers or cargo.
3. Upon naval vessels, other than transports, colliers, hospital ships and supply ships, fifty (50) cents per displacement ton.
4. Upon army and navy transports, colliers, hospital ships and supply ships one dollar and twenty cents (\$1.20) per net ton, the vessels to be measured by the same rules as are employed in determining the net tonnage of merchant vessels.

The Secretary of War will prepare and prescribe such rules for the measurement of vessels and such regulations as may be necessary and proper to carry this proclamation into full force and effect.

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<sup>1</sup>No. 1225, November 13, 1912.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this thirteenth day of November in the year of our Lord one thousand  
[SEAL.] nine hundred and twelve and of the independence of the United States the one hundred and thirty-seventh.

WM. H. TAFT.

By the President:

P. C. KNOX,  
*Secretary of State.*

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THE SECRETARY OF STATE FOR FOREIGN AFFAIRS OF GREAT BRITAIN  
TO AMBASSADOR BRYCE.<sup>1</sup>

[Handed to the Secretary of State by the British Ambassador December 9, 1912.]

FOREIGN OFFICE, *November 14, 1912.*

SIR,

Your Excellency will remember that on the 8th July, 1912, Mr. Mitchell Innes communicated to the Secretary of State the objections which His Majesty's Government entertained to the legislation relating to the Panama Canal, which was then under discussion in Congress, and that on the 27th August, after the passing of the Panama Canal Act and the issue of the President's memorandum on signing it, he informed Mr. Knox that when His Majesty's Government had had time to consider fully the Act and the memorandum a further communication would be made to him.

Since that date the text of the Act and the memorandum of the President have received attentive consideration at the hands of His Majesty's Government. A careful study of the President's memorandum has convinced me that he has not fully appreciated the British point of view, and has misunderstood Mr. Mitchell Innes' note of the 8th July. The President argues upon the assumption that it is the intention of His Majesty's Government to place upon the Hay-Pauncefote Treaty an interpretation which would prevent the United States from granting subsidies to their own shipping

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<sup>1</sup>Pamphlet printed by the Department of State, Washington, D. C.

passing through the canal, and which would place them at a disadvantage as compared with other nations. This is not the case; His Majesty's Government regard equality of all nations as the fundamental principle underlying the treaty of 1901 in the same way that it was the basis of the Suez Canal Convention of 1888, and they do not seek to deprive the United States of any liberty which is open either to themselves or to any other nation; nor do they find either in the letter or in the spirit of the Hay-Pauncefote Treaty any surrender by either of the contracting Powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient.

The terms of the President's memorandum render it essential that I should explain in some detail the view which His Majesty's Government take as to what is the proper interpretation of the treaty, so as to indicate the limitations which they consider it imposes upon the freedom of action of the United States, and the points in which the Panama Canal Act, as enacted, infringes what His Majesty's Government hold to be their treaty rights.

The Hay-Pauncefote Treaty does not stand alone; it was the corollary of the Clayton-Bulwer Treaty of 1850. The earlier treaty was, no doubt, superseded by it, but its general principle, as embodied in Article 8, was not to be impaired. The object of the later treaty is clearly shown by its preamble; it was "to facilitate the construction of a ship canal to connect the Atlantic and Pacific oceans by whatever route may be deemed expedient, and to that end to remove any objection which may arise out of the Clayton-Bulwer Treaty to the construction of such canal under the auspices of the Government of the United States, without impairing the general principle of neutralisation established in Article 8 of that convention." It was upon that footing, and upon that footing alone, that the Clayton-Bulwer Treaty was superseded.

Under that treaty both parties had agreed not to obtain any exclusive control over the contemplated ship canal, but the importance of the great project was fully recognised, and therefore the construction of the canal by others was to be encouraged, and the canal when completed was to enjoy a special measure of protection on the part of both the contracting parties.

Under Article 8 the two Powers declared their desire, in entering into the Convention, not only to accomplish a particular object, but

also to establish a general principle, and therefore agreed to extend their protection to any practicable trans-isthmian communication, either by canal or railway, and either at Tehuantepec or Panama, provided that those who constructed it should impose no other charges or conditions of traffic than the two Governments should consider just and equitable, and that the canal or railway, "being open to the subjects and citizens of Great Britain and the United States on equal terms, should also be open to the subjects of any other State which was willing to join in the guarantee of joint protection."

So long as the Clayton-Bulwer Treaty was in force, therefore, the position was that both parties to it had given up their power of independent action, because neither was at liberty itself to construct the canal and thereby obtain the exclusive control which such construction would confer. It is also clear that if the canal had been constructed while the Clayton-Bulwer Treaty was in force, it would have been open, in accordance with Article 8, to British and United States ships on equal terms, and equally clear, therefore, that the tolls leviable on such ships would have been identical.

The purpose of the United States in negotiating the Hay-Pauncefote Treaty was to recover their freedom of action, and obtain the right, which they had surrendered, to construct the canal themselves; this is expressed in the preamble to the treaty, but the complete liberty of action consequential upon such construction was to be limited by the maintenance of the general principle embodied in Article 8 of the earlier treaty. That principle, as shown above, was one of equal treatment for both British and United States ships, and a study of the language of Article 8 shows that the word "neutralisation," in the preamble of the later treaty, is not there confined to belligerent operations, but refers to the system of equal rights for which Article 8 provides.

If the wording of the article is examined, it will be seen that there is no mention of belligerent action in it at all. Joint protection and equal treatment are the only matters alluded to, and it is to one, or both, of these that neutralisation must refer. Such joint protection has always been understood by His Majesty's Government to be one of the results of the Clayton-Bulwer Treaty of which the United States was most anxious to get rid, and they can scarcely therefore believe that it was such joint protection that the United States were willing to keep alive, and to which they referred in the



preamble of the Hay-Pauncefote Treaty. It certainly was not the intention of His Majesty's Government that any responsibility for the protection of the canal should attach to them in the future. Neutralisation must therefore refer to the system of equal rights.

It thus appears from the preamble that the intention of the Hay-Pauncefote Treaty was that the United States was to recover the right to construct the trans-isthmian canal upon the terms that, when constructed the canal was to be open to British and United States ships on equal terms.

The situation created was in fact identical with that resulting from the Boundary Waters Treaty of 1909 between Great Britain and the United States, which provided as follows:—

The high contracting parties agree that the navigation of all navigable boundary waters shall for ever continue free and open for the purposes of commerce to the inhabitants and to the ships, vessels, and boats of both countries equally, subject, however, to any laws and regulations of either country, within its own territory, not inconsistent with such privilege of free navigation, and applying equally and without discrimination to the inhabitants, ships, vessels, and boats of both countries.

It is further agreed that so long as this treaty shall remain in force this same right of navigation shall extend to the waters of Lake Michigan and to all canals connecting boundary waters and now existing, or which may hereafter be constructed on either side of the line. Either of the high contracting parties may adopt rules and regulations governing the use of such canals within its own territory, and may charge tolls for the use thereof; but all such rules and regulations and all tolls charged shall apply alike to the subjects or citizens of the high contracting parties, and they \* \* \* shall be placed on terms of equality in the use thereof.

A similar provision, though more restricted in its scope, appears in Article 27 of the Treaty of Washington, 1871, and Your Excellency will no doubt remember how strenuously the United States protested, as a violation of equal rights, against a system which Canada had introduced of a rebate of a large portion of the tolls on certain freight on the Welland Canal, provided that such freight was taken as far as Montreal, and how in the face of that protest the system was abandoned.

The principle of equality is repeated in Article 3 of the Hay-

Pauncefote Treaty, which provides that the United States adopts, as the basis of the neutralisation of the canal, certain rules, substantially as embodied in the Suez Canal Convention. The first of these rules is that the canal shall be free and open to the vessels of commerce and war of all nations observing the rules on terms of entire equality, so that there shall be no discrimination against any such nation.

The word "neutralisation" is no doubt used in Article 3 in the same sense as in the preamble, and implies subjection to the system of equal rights. The effect of the first rule is therefore to establish the provision, foreshadowed by the preamble and consequent on the maintenance of the principle of Article 8 of the Clayton-Bulwer Treaty, that the canal is to be open to British and United States vessels on terms of entire equality. It also embodies a promise on the part of the United States that the ships of all nations which observe the rules will be admitted to similar privileges.

The President in his memorandum treats the words "all nations" as excluding the United States. He argues that, as the United States is constructing the canal at its own cost on territory ceded to it, it has, unless it has restricted itself, an absolute right of ownership and control, including the right to allow its own commerce the use of the canal upon such terms as it sees fit, and that the only question is whether it has by the Hay-Pauncefote Treaty deprived itself of the exercise of the right to pass its own commerce free or remit tolls collected for the use of the canal. He argues that Article 3 of the treaty is nothing more than a declaration of policy by the United States that the canal shall be neutral and all nations treated alike and no discrimination made against any one of them observing the rules adopted by the United States. "In other words, it was a conditional favoured-nation treatment, the measure of which, in the absence of express stipulations to that effect, is not what the country gives to its own nationals, but the treatment it extends to other nations."

For the reasons they have given above His Majesty's Government believe this statement of the case to be wholly at variance with the real position. They consider that by the Clayton-Bulwer Treaty the United States had surrendered the right to construct the canal, and that by the Hay-Pauncefote Treaty they recovered that right upon the footing that the canal should be open to British and United States vessels upon terms of equal treatment.

The case can not be put more clearly than it was put by Mr. Hay himself, who, as Secretary of State, negotiated the Hay-Pauncefote Treaty, in the full account of the negotiations which he sent to the Senate Committee on Foreign Relations (see Senate Document No. 746, 61st Congress, 3rd session) :—

These rules are adopted in the treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer Treaty.

If the rules set out in the Hay-Pauncefote Treaty secure to Great Britain no more than most-favoured-nation treatment, the value of the consideration given for superseding the Clayton-Bulwer Treaty is not apparent to His Majesty's Government. Nor is it easy to see in what way the principle of Article 8 of the Clayton-Bulwer Treaty, which provides for equal treatment of British and United States ships, has been maintained.

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in Article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for revictualling its war-ships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote Treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralisation of the Panama Canal by subjecting it to the same régime as the Suez Canal. Rules 3, 4, and 5 of Article 3 of the treaty are taken almost textually from Articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in Articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the

measure of her autonomy, to take such measures as may be necessary for securing the defence of Egypt and the maintenance of public order, and, in the case of Turkey, the defence of her possessions on the Red Sea.

Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

For these reasons, His Majesty's Government maintain that the words "all nations" in Rule 1 of Article 3 of the Hay-Pauncefote Treaty include the United States, and that, in consequence, British vessels using the canal are entitled to equal treatment with those of the United States, and that the same tolls are chargeable on each.

This rule also provides that the tolls should be "just and equitable." The purpose of these words was to limit the tolls to the amount representing the fair value of the services rendered, *i. e.*, to the interest on the capital expended and the cost of the operation and maintenance of the canal. Unless the whole volume of shipping which passes through the canal, and which all benefits equally by its services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the canal, that is to say, interest on the capital expended in construction, and the cost of operation and maintenance. If any classes of vessels are exempted from tolls in such a way that no receipts from such ships are taken into account in the income of the canal, there is no guarantee that the vessels upon which tolls are being levied are not being made to bear more than their fair share of the upkeep. Apart altogether, therefore, from the provision in Rule 1 about equality of treatment for all nations, the stipulation that the tolls shall be just and equitable, when rightly understood, entitles His Majesty's Government to demand, on behalf of British shipping, that all vessels passing through the canal, whatever their flag or their character, shall be taken into account in fixing the amount of the tolls.

The result is that any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the treaty that the canal should be open on terms of entire equality, and that the charges should be just and equitable.

The President, in his memorandum, argues that if there is no

difference, as stated in Mr. Mitchell Innes' note on the 8th July, between charging tolls only to refund them and remitting tolls altogether, the effect is to prevent the United States from aiding its own commerce in the way that all other nations may freely do. This is not so. His Majesty's Government have no desire to place upon the Hay-Pauncefote Treaty an interpretation which would impose upon the United States any restriction from which other nations are free, or reserve to such other nation any privilege which is denied to the United States. Equal treatment, as specified in the treaty, is all they claim.

His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally, or to any particular branches of that shipping, but it does not follow therefore that the United States may not be debarred by the Hay-Pauncefote Treaty from granting a subsidy to certain shipping in a particular way, if the effect of the method chosen for granting such subsidy would be to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this treaty.

If the United States exempt certain classes of ships from the payment of tolls the result would be a form of subsidy to those vessels which His Majesty's Government consider the United States are debarred by the Hay-Pauncefote Treaty from making.

It remains to consider whether the Panama Canal Act, in its present form, conflicts with the treaty rights to which His Majesty's Government maintain they are entitled.

Under section 5 of the Act the President is given, within certain defined limits, the right to fix the tolls, but no tolls are to be levied upon ships engaged in the coastwise trade of the United States, and the tolls, when based upon net registered tonnage for ships of commerce, are not to exceed 1 dollar 25c. per net registered ton, nor be less, *other than for vessels of the United States and its citizens*, than the estimated proportionate cost of the actual maintenance and operation of the canal. There is also an exception for the exemptions granted by Article 19 of the Convention with Panama of 1903.

The effect of these provisions is that vessels engaged in the coastwise trade will contribute nothing to the upkeep of the canal. Similarly vessels belonging to the Government of the Republic of Panama

will, in pursuance of the treaty of 1903, contribute nothing to the upkeep of the canal. Again, in the cases where tolls are levied, the tolls in the case of ships belonging to the United States and its citizens may be fixed at a lower rate than in the case of foreign ships, and may be less than the estimated proportionate cost of the actual maintenance and operation of the canal.

These provisions (1) clearly conflict with the rule embodied in the principle established in Article 8 of the Clayton-Bulwer Treaty of equal treatment for British and United States ships, and (2) would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with Rule 1 of Article 3 of the Hay-Pauncefote Treaty.

It has been argued that as the coastwise trade of the United States is confined by law to United States vessels, the exemption of vessels engaged in it from the payment of tolls cannot injure the interests of foreign nations. It is clear, however, that the interests of foreign nations will be seriously injured in two material respects.

In the first place, the exemption will result in the cost of the working of the canal being borne wholly by foreign-going vessels, and on such vessels, therefore, will fall the whole burden of raising the revenue necessary to cover the cost of working and maintaining the canal. The possibility, therefore, of fixing the toll on such vessels at a lower figure than 1 dol. 25c. per ton, or of reducing the rate below that figure at some future time, will be considerably lessened by the exemption.

In the second place, the exemption will, in the opinion of His Majesty's Government, be a violation of the equal treatment secured by the treaty, as it will put the "coastwise trade" in a preferential position as regards other shipping. Coastwise trade cannot be circumscribed so completely that benefits conferred upon it will not affect vessels engaged in the foreign trade. To take an example, if cargo intended for an United States port beyond the canal, either from east or west, and shipped on board a foreign ship could be sent to its destination more cheaply, through the operation of the proposed exemption, by being landed at an United States port before reaching the canal, and then sent on as coastwise trade, shippers would benefit by adopting this course in preference to sending the goods direct to their destination through the canal on board the foreign ship.

Again, although certain privileges are granted to vessels engaged in an exclusively coastwise trade, His Majesty's Government are given to understand that there is nothing in the laws of the United States which prevents any United States ship from combining foreign commerce with coastwise trade, and consequently from entering into direct competition with foreign vessels while remaining *prima facie* entitled to the privilege of free passage through the canal. Moreover any restriction which may be deemed to be now applicable might at any time be removed by legislation or even perhaps by mere changes in the regulations.

In these and in other ways foreign shipping would be seriously handicapped, and any adverse result would fall more severely on British shipping than on that of any other nationality.

The volume of British shipping which will use the canal will in all probability be very large. Its opening will shorten by many thousands of miles the waterways between England and other portions of the British Empire, and if on the one hand it is important to the United States to encourage its mercantile marine and establish competition between coastwise traffic and trans-continental railways, it is equally important to Great Britain to secure to its shipping that just and impartial treatment to which it is entitled by treaty, and in return for a promise of which it surrendered the rights which it held under the earlier convention.

There are other provisions of the Panama Canal Act to which the attention of His Majesty's Government has been directed. These are contained in Section 11, part of which enacts that a railway company, subject to the Interstate Commerce Act, 1887, is prohibited from having any interest in vessels operated through the canal with which such railways may compete, and another part provides that a vessel permitted to engage in the coastwise or foreign trade of the United States is not allowed to use the canal if its owner is guilty of violating the Sherman Anti-Trust Act.

His Majesty's Government do not read this section of the Act as applying to, or affecting, British ships, and they therefore do not feel justified in making any observations upon it. They assume that it applies only to vessels flying the flag of the United States, and that it is aimed at practices which concern only the internal trade of the United States. If this view is mistaken and the provisions are intended to apply under any circumstances to British ships, they must

reserve their right to examine the matter further and to raise such contentions as may seem justified.

His Majesty's Government feel no doubt as to the correctness of their interpretation of the treaties of 1850 and 1901, and as to the validity of the rights they claim under them for British shipping; nor does there seem to them to be any room for doubt that the provisions of the Panama Canal Act as to tolls conflict with the rights secured to their shipping by the treaty. But they recognise that many persons of note in the United States, whose opinions are entitled to great weight, hold that the provisions of the Act do not infringe the conventional obligations by which the United States is bound, and under these circumstances they desire to state their perfect readiness to submit the question to arbitration if the Government of the United States would prefer to take this course. A reference to arbitration would be rendered unnecessary if the Government of the United States should be prepared to take such steps as would remove the objections to the Act which His Majesty's Government have stated.

Knowing as I do full well the interest which this great undertaking has aroused in the New World and the emotion with which its opening is looked forward to by United States citizens, I wish to add before closing this despatch that it is only with great reluctance that His Majesty's Government have felt bound to raise objection on the ground of treaty rights to the provisions of the Act. Animated by an earnest desire to avoid points which might in any way prove embarrassing to the United States, His Majesty's Government have confined their objections within the narrowest possible limits, and have recognized in the fullest manner the right of the United States to control the canal. They feel convinced that they may look with confidence to the Government of the United States to ensure that in promoting the interests of United States shipping, nothing will be done to impair the safeguards guaranteed to British shipping by treaty.

Your Excellency will read this despatch to the Secretary of State and will leave with him a copy.

I am, &c.,

E. GREY.



THE SECRETARY OF STATE TO CHARGÉ D'AFFAIRES LAUGHLIN.<sup>1</sup>

No. 1833.]

DEPARTMENT OF STATE,  
WASHINGTON, *January 17, 1913.*

IRWIN B. LAUGHLIN, Esquire,

*American Chargé d'Affaires, London, England.*

SIR: I enclose a copy of an instruction from Sir Edward Grey to His Britannic Majesty's Ambassador at Washington, dated November 14, 1912, a copy of which was handed to me by the Ambassador on the 9th ultimo, in which certain provisions in the Panama Canal Act of August 24th last are discussed in their relation to the Hay-Pauncefote Treaty of November 18, 1901; and I also enclose a copy of the note addressed to me on July 8, 1912, by Mr. A. Mitchell Innes, His Britannic Majesty's Chargé d'Affaires, stating the objections which his government entertained to the legislation relating to the Panama Canal, which was then under discussion in Congress. A copy of the President's proclamation of November 13, 1912, fixing the canal tolls, is also enclosed.

Sir Edward Grey's communication, after setting forth the several grounds upon which the British Government believe the provisions of the Act are inconsistent with the stipulations of the Hay-Pauncefote Treaty, states the readiness of his government "to submit the question to arbitration if the Government of the United States would prefer to take this course" rather than "to take such steps as would remove the objections to the Act which His Majesty's Government have stated." It, therefore, becomes necessary for this government to examine these objections in order to ascertain exactly in what respects this Act is regarded by the British Government as inconsistent with the provisions of that treaty, and also to explain the views of this government upon the questions thus presented, and to consider the advisability at this time of submitting any of these questions to arbitration.

It may be stated at the outset that this government does not agree with the interpretation placed by Sir Edward Grey upon the Hay-Pauncefote Treaty, or upon the Clayton-Bulwer Treaty, but for reasons which will appear hereinbelow it is not deemed necessary at present to amplify or reiterate the views of this government upon the meaning of those treaties.

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<sup>1</sup>Pamphlet printed by Department of State, Washington, D. C.

In Sir Edward Grey's communication, after explaining in detail the views taken by his government as to the proper interpretation of the Hay-Pauncefote Treaty, "so as to indicate the limitations which" His Majesty's Government "consider it imposes upon the freedom of action of the United States," he proceeds to indicate the points in which the Canal Act infringes what he holds to be Great Britain's treaty rights.

It is obvious from the whole tenor of Sir Edward Grey's communication that in writing it he could not have taken cognizance of the President's proclamation fixing the canal tolls. Indeed, a comparison of the dates of the proclamation and the note, which are dated respectively November 13th and November 14th last, shows that the proclamation could hardly have been received in London in time for consideration in the note. Throughout his discussion of the subject, Sir Edward Grey deals chiefly with the possibilities of what the President might do under the Act, which in itself does not prescribe the tolls, but merely authorizes the President to do so; and nowhere does the note indicate that Sir Edward Grey was aware of what the President actually had done in issuing this proclamation. The proclamation, therefore, has entirely changed the situation which is discussed by Sir Edward Grey, and the diplomatic discussion, which his note now makes inevitable, must rest upon the bases as they exist at present, and not upon the hypothesis formed by the British Government at the time this note was written.

Sir Edward Grey presents the question of conflict between the Act and the treaty in the following language:

It remains to consider whether the Panama Canal Act, in its present form, conflicts with the treaty rights to which His Majesty's Government maintain they are entitled.

Under section 5 of the Act the President is given, within certain defined limits, the right to fix the tolls, but no tolls are to be levied upon ships engaged in the coastwise trade of the United States, and the tolls, when based upon net registered tonnage for ships of commerce, are not to exceed 1 dollar 25 c. per net registered ton, nor be less, *other than for vessels of the United States and its citizens*, than the estimated proportionate cost of the actual maintenance and operation of the Canal. There is also an exception for the exemptions granted by article 19 of the Convention with Panama of 1903.

The effect of these provisions is that vessels engaged in the

coastwise trade will contribute nothing to the upkeep of the Canal. Similarly vessels belonging to the Government of the Republic of Panama will, in pursuance of the treaty of 1903, contribute nothing to the upkeep of the Canal. Again, in the cases where tolls are levied, the tolls in the case of ships belonging to the United States and its citizens may be fixed at a lower rate than in the case of foreign ships, and may be less than the estimated proportionate cost of the actual maintenance and operation of the Canal.

These provisions (1) clearly conflict with the rule embodied in the principle established in article 8 of the Clayton-Bulwer Treaty of equal treatment for British and United States ships, and (2) would enable tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote Treaty.

From this it appears that three objections are made to the provisions of the Act; first, that no tolls are to be levied upon ships engaged in the coastwise trade of the United States; second, that a discretion appears to be given to the President to discriminate in fixing tolls in favor of ships belonging to the United States and its citizens as against foreign ships; and third, that an exemption has been given to the vessels of the Republic of Panama under Article 19 of the Convention with Panama of 1903.

Considered in the reverse order of their statement, the third objection, coming at this time, is a great and complete surprise to this government. The exemption under that article applies only to the government vessels of Panama, and was part of the agreement with Panama under which the canal was built. The convention containing the exemption was ratified in 1904, and since then to the present time no claim has been made by Great Britain that it conflicted with British rights. The United States has always asserted the principle that the status of the countries immediately concerned by reason of their political relation to the territory in which the canal was to be constructed was different from that of all other countries. The Hay-Herran Treaty with Colombia of 1903 also provided that the war vessels of that country were to be given free passage. It has always been supposed by this government that Great Britain recognized the propriety of the exemptions made in both of those treaties. It is not believed, therefore, that the British Government intended to be understood as proposing arbitration upon the question of whether

or not this provision of the Act, which in accordance with our treaty with Panama exempts from tolls the government vessels of Panama, is in conflict with the provisions of the Hay-Pauncefote Treaty.

Considering the second objection based upon the discretion thought to be conferred upon the President to discriminate in favor of ships belonging to the United States and its citizens, it is sufficient, in view of the fact that the President's proclamation fixing the tolls was silent on the subject, to quote the language used by the President in the memorandum attached to the Act at the time of signature, in which he says—

It is not, therefore, necessary to discuss the policy of such discrimination until the question may arise in the exercise of the President's discretion.

On this point no question has as yet arisen which, in the words of the existing arbitration treaty between the United States and Great Britain, "it may not have been possible to settle by diplomacy," and until then any suggestion of arbitration may well be regarded as premature.

It is not believed, however, that in the objection now under consideration Great Britain intends to question the right of the United States to exempt from the payment of tolls its vessels of war and other vessels engaged in the service of this government. Great Britain does not challenge the right of the United States to protect the canal. United States vessels of war and those employed in government service are a part of our protective system. By the Hay-Pauncefote Treaty we assume the sole responsibility for its neutralization. It is inconceivable that this government should be required to pay canal tolls for the vessels used for protecting the canal, which we alone must protect. The movement of United States vessels in executing governmental policies of protection are not susceptible of explanation or differentiation. The United States could not be called upon to explain what relation the movement of a particular vessel through the canal has to its protection. The British objection, therefore, is understood as having no relation to the use of the canal by vessels in the service of the United States Government.

Regarding the first objection, the question presented by Sir Edward Grey arises solely upon the exemption in the Canal Act of vessels engaged in our coastwise trade.

On this point Sir Edward Grey says that "His Majesty's Government do not question the right of the United States to grant subsidies to United States shipping generally, or to any particular branches of that shipping," and it is admitted in his note that the exemption of certain classes of ships would be "a form of subsidy" to those vessels; but it appears from the note that His Majesty's Government would regard that form of subsidy as objectionable under the treaty if the effect of such subsidy would be "to impose upon British or other foreign shipping an unfair share of the burden of the upkeep of the Canal, or to create a discrimination in respect of the conditions or charges of traffic, or otherwise to prejudice rights secured to British shipping by this Treaty."

It is not contended by Great Britain that equality of treatment has any reference to British participation in the coastwise trade of the United States, which, in accordance with general usage, is reserved to American ships. The objection is only to such exemption of that trade from toll payments as may adversely affect British rights to equal treatment in the payment of tolls, or to just and equitable tolls. It will be helpful here to recall that we are now only engaged in considering (quoting from Sir Edward Grey's note) "whether the Panama Canal Act in its present form conflicts with the treaty rights to which His Majesty's Government maintain they are entitled," concerning which he concludes:

*These provisions* (1) clearly conflict with the rule embodied in the principle established in article 8 of the Clayton-Bulwer Treaty of equal treatment for British and United States ships, and (2) *would enable* tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote Treaty.

On the first of these points the objection of the British Government to the exemption of vessels engaged in the coastwise trade of the United States is stated as follows:

\* \* \* the exemption will, in the opinion of His Majesty's Government, be a violation of the equal treatment secured by the treaty, as it will put the "coastwise trade" in a preferential position as regards other shipping. Coastwise trade cannot be circumscribed so completely that benefits conferred upon it will not affect vessels engaged in the foreign trade. To take an example,

if cargo intended for an United States port beyond the Canal, either from east or west, and shipped on board a foreign ship could be sent to its destination more cheaply, through the operation of proposed exemption, by being landed at an United States port before reaching the Canal, and then sent on as coastwise trade, shippers would benefit by adopting this course in preference to sending the goods direct to their destination through the Canal on board the foreign ship.

This objection must be read in connection with the views expressed by the British Government while this Act was pending in Congress, which were stated in the note of July 8, 1912, on the subject from Mr. Innes as follows:

As to the proposal that exemption shall be given to vessels engaged in the coastwise trade, a more difficult question arises. If the trade should be so regulated as to make it certain that only bona-fide coastwise traffic which is reserved for United States vessels would be benefited by this exemption, it may be that no objection could be taken.

This statement may fairly be taken as an admission that this government may exempt its vessels engaged in the coastwise trade from the payment of tolls, provided such exemption be restricted to bona fide coastwise traffic. As to this it is sufficient to say that obviously the United States is not to be denied the power to remit tolls to its own coastwise trade because of a suspicion or possibility that the regulations yet to be framed may not restrict this exemption to bona fide coastwise traffic.

The answer to this objection, therefore, apart from any question of treaty interpretation, is that it rests on conjecture as to what may happen rather than upon proved facts, and does not present a question requiring submission to arbitration as it has not as yet passed beyond the stage where it can be profitably dealt with by diplomatic discussion. It will be remembered that only questions which it may not be possible to settle by diplomacy are required by our arbitration treaty to be referred to arbitration.

On this same point Sir Edward Grey urges another objection to the exemption of coastwise vessels as follows:

Again, although certain privileges are granted to vessels engaged in an exclusively coastwise trade, His Majesty's Government are

given to understand that there is nothing in the laws of the United States which prevents any United States ship from combining foreign commerce with coastwise trade, and consequently from entering into direct competition with foreign vessels while remaining "prima facie" entitled to the privilege of free passage through the Canal. Moreover, any restriction which may be deemed to be now applicable might at any time be removed by legislation or even perhaps by mere changes in the regulations.

This objection also raises a question which, apart from treaty interpretation, depends upon future conditions and facts not yet ascertained, and for the same reasons as are above stated its submission to arbitration at this time would be premature.

The second point of Sir Edward Grey's objection to the exemption of vessels engaged in coastwise trade remains to be considered. On this point he says that the provisions of the Act "*would enable* tolls to be fixed which would not be just and equitable, and would therefore not comply with rule 1 of article 3 of the Hay-Pauncefote Treaty."

It will be observed that this statement evidently was framed without knowledge of the fact that the President's proclamation fixing the tolls had issued. It is not claimed in the note that the tolls actually fixed are not "just and equitable" or even that all vessels passing through the canal were not taken into account in fixing the amount of the tolls, but only that either or both contingencies are possible.

If the British contention is correct that the true construction of the treaty requires all traffic to be reckoned in fixing just and equitable tolls, it requires at least an allegation that the tolls as fixed are not just and equitable and that all traffic has not been reckoned in fixing them before the United States can be called upon to prove that this course was not followed, even assuming that the burden of proof would rest with the United States in any event, which is open to question. This Government welcomes the opportunity, however, of informing the British Government that the tolls fixed in the President's proclamation are based upon the computations set forth in the report of Professor Emory R. Johnson, a copy of which is forwarded herewith for delivery to Sir Edward Grey, and that the tolls which would be paid by American coastwise vessels, but for the exemption contained in the Act, were computed in determining the rate fixed by the President.

By reference to page 208 of Professor Johnson's report, it will be seen that the estimated net tonnage of shipping using the canal in 1915 is as follows:

Coast to coast American shipping.....	1,000,000 tons
American shipping carrying foreign commerce of the United States.....	720,000 tons
Foreign shipping carrying commerce of the United States and foreign countries....	8,780,000 tons

It was on this estimate that tolls fixed in the President's proclamation were based.

Sir Edward Grey says, "This rule [1 of Article 3 of the Hay-Pauncefote Treaty] also provides that the tolls should be 'just and equitable.'" The purpose of these words, he adds, "was to limit the tolls to the amount representing the fair value of the services rendered, *i. e.*, to the interest on the capital expended and the cost of the operation and maintenance of the canal." If, as a matter of fact, the tolls now fixed (of which he seems unaware) do not exceed this requirement, and as heretofore pointed out there is no claim that they do, it is not apparent under Sir Edward Grey's contention how Great Britain could be receiving unjust and inequitable treatment if the United States favors its coastwise vessels by not collecting their share of the tolls necessary to meet the requirement. There is a very clear distinction between an omission to "take into account" the coastwise tolls in order to determine a just and equitable rate, which is as far as this objection goes, and the remission of such tolls, or their collection coupled with their repayment in the form of a subsidy.

The exemption of the coastwise trade from tolls, or the refunding of tolls collected from the coastwise trade, is merely a subsidy granted by the United States to that trade, and the loss resulting from not collecting, or from refunding those tolls, will fall solely upon the United States. In the same way the loss will fall on the United States if the tolls fixed by the President's proclamation on all vessels represent less than the fair value of the service rendered, which must necessarily be the case for many years; and the United States will, therefore, be in the position of subsidizing or aiding not merely its own coastwise vessels, but foreign vessels as well.

Apart from the particular objections above considered, it is not understood that Sir Edward Grey questions the right of the United



States to subsidize either its coastwise or its foreign shipping, inasmuch as he says that His Majesty's Government do not find "either in the letter or the spirit of the Hay-Pauncefote Treaty any surrender by either of the contracting Powers of the right to encourage its shipping or its commerce by such subsidies as it may deem expedient."

To summarize the whole matter: The British objections are, in the first place, about the Canal Act only; but the Canal Act does not fix the tolls. They ignore the President's proclamation fixing the tolls which puts at rest practically all of the supposititious injustice and inequality which Sir Edward Grey thinks might follow the administration of the Act, and concerning which he expresses so many and grave fears. Moreover, the gravamen of the complaint is not that the Canal Act will actually injure in its operation British shipping or destroy rights claimed for such shipping under the Hay-Pauncefote Treaty, but that such injury or destruction may possibly be the effect thereof; and further, and more particularly, Sir Edward Grey complains that the action of Congress in enacting the legislation under discussion foreshadows that Congress or the President may hereafter take some action which might be injurious to British shipping and destructive of its rights under the treaty. Concerning this possible future injury, it is only necessary to say that in the absence of an allegation of actual or certainly impending injury, there appears nothing upon which to base a sound complaint. Concerning the infringement of rights claimed by Great Britain, it may be remarked that it would, of course, be idle to contend that Congress has not the power, or that the President properly authorized by Congress, may not have the power to violate the terms of the Hay-Pauncefote Treaty, in its aspect as a rule of municipal law. Obviously, however, the fact that Congress has the power to do something contrary to the welfare of British shipping or that Congress has put or may put into the hands of the President the power to do something which may be contrary to the interests possessed by British shipping affords no just ground for complaint. It is the improper exercise of a power and not its possession which alone can give rise to an international cause of action; or to put it in terms of municipal law, it is not the possession of the power to trespass upon another's property which gives a right of action in trespass, but only the actual exercise of that power in committing the act of trespass itself.

When, and if, complaint is made by Great Britain that the effect of the Act and the proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls in conflict with the terms of the Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by that treaty both to take into account and to collect tolls from American vessels, and also whether under the obligations of that treaty British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration. The existence of an arbitration treaty does not create a right of action; it merely provides a means of settlement to be resorted to only when other resources of diplomacy have failed. It is not now deemed necessary, therefore, to enter upon a discussion of the views entertained by Congress and by the President as to the meaning of the Hay-Pauncefote Treaty in relation to questions of fact which have not yet arisen, but may possibly arise in the future in connection with the administration of the Act under consideration.

It is recognized by this government that the situation developed by the present discussion may require an examination by Great Britain into the facts above set forth as to the basis upon which the tolls fixed by the President's proclamation have been computed, and also into the regulations and restrictions circumscribing the coastwise trade of the United States, as well as into other facts bearing upon the situation, with the view of determining whether or not, as a matter of fact, under present conditions there is any ground for claiming that the Act and proclamation actually subject British vessels to inequality of treatment, or to unjust and inequitable tolls.

If it should be found as a result of such an examination on the part of Great Britain that a difference of opinion exists between the two governments on any of the important questions of fact involved in this discussion, then a situation will have arisen, which, in the opinion of this government, could with advantage be dealt with by referring the controversy to a commission of inquiry for examination and report, in the manner provided for in the unratified arbitration treaty of August 3, 1911, between the United States and Great Britain.

The necessity for inquiring into questions of fact in their relation to controversies under diplomatic discussion was contemplated by

both parties in negotiating that treaty, which provides for the institution, as occasion arises, of a joint high commission of inquiry, to which, upon the request of either party, might be referred for impartial and conscientious investigation any controversy between them, the commission being authorized upon such reference "to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate."

This proposal might be carried out, should occasion arise for adopting it, either under a special agreement, or under the unratified arbitration treaty above mentioned, if Great Britain is prepared to join in ratifying that treaty, which the United States is prepared to do.

You will take an early opportunity to read this despatch to Sir Edward Grey; and if he should so desire, you will leave a copy of it with him.

I am, Sir,

Your obedient servant,

P. C. KNOX.

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THE BRITISH AMBASSADOR TO THE SECRETARY OF STATE.<sup>1</sup>

BRITISH EMBASSY

WASHINGTON

*February 27, 1913.*

SIR:

His Majesty's Government are unable before the Administration leaves office to reply fully to the arguments contained in your despatch of the 17th ultimo to the United States Chargé d'Affaires at London regarding the difference of opinion that has arisen between our two Governments as to the interpretation of the Hay-Pauncefote Treaty, but they desire me in the meantime to offer the following observations with regard to the argument that no case has yet arisen calling for any submission to arbitration of the points in difference between His Majesty's Government and that of the United States on

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<sup>1</sup>Pamphlet printed by the Department of State, Washington, D. C.

the interpretation of the Hay-Pauncefote Treaty, because no actual injury has as yet resulted to any British interest and all that has been done so far is to pass an Act of Congress under which action held by His Majesty's Government to be prejudicial to British interests might be taken.

From this view His Majesty's Government feel bound to express their dissent. They conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so infringed or brought into question by a denial that they exist, must, before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a concrete instance has been taken, which in the present instance would, according to your argument, seem to mean; until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted.

The terms of the Proclamation issued by the President fixing the Canal tolls, and the particular method which your note sets forth as having been adopted by him, in his discretion, on a given occasion for determining on what basis they should be fixed do not appear to His Majesty's Government to affect the general issue as to the meaning of the Hay-Pauncefote Treaty which they have raised. In their view the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States and when, in further directing the President to fix those tolls within certain limits, it distinguished between vessels of the citizens of the United States and other vessels, was in itself and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote Treaty for equality of treatment between the vessels of all nations. The exemption referred to appears to His Majesty's Government to conflict with the express words of Rule 1 of Article 3 of the Hay-Pauncefote Treaty, and the Act gave the President no power to modify or discontinue the exemption.

In their opinion the mere conferring by Congress of power to fix lower tolls on United States ships than on British ships amounts to a denial of the right of British shipping to equality of treatment, and is therefore inconsistent with the treaty irrespective of the particular way in which such power has been so far actually exercised.

In stating thus briefly their view of the compatibility of the Act of Congress with their Treaty rights His Majesty's Government hold that the difference which exists between the two Governments is clearly one which falls within the meaning of Article 1 of the Arbitration Treaty of 1908.

As respects the suggestion contained in the last paragraph but one of your note under reply His Majesty's Government conceive that Article I of the Treaty of 1908 so clearly meets the case that has now arisen that it is sufficient to put its provisions in force in whatever manner the two governments may find the most convenient. It is unnecessary to repeat that a reference to arbitration would be rendered superfluous if steps were taken by the United States Government to remove the objection entertained by His Majesty's Government to the Act.

His Majesty's Government have not desired me to argue in this Note that the view they take of the main issue—the proper interpretation of the Hay-Pauncefote Treaty—is the correct view, but only that a case for the determination of that issue has already arisen and now exists. They conceive that the interest of both countries requires that issue to be settled promptly before the opening of the Canal, and by means which will leave no ground for regret or complaint. The avoidance of possible friction has been one of the main objects of those methods of arbitration of which the United States has been for so long a foremost and consistent advocate. His Majesty's Government think it more in accordance with the General Arbitration Treaty that the settlement desired should precede rather than follow the doing of any acts, which could raise questions of actual damage suffered; and better also that when vessels begin to pass through the great waterway in whose construction all the world has been interested there should be left subsisting no cause of difference which could prevent any other nation from joining without reserve in the satisfaction the people of the United States will feel at the completion of a work of such grandeur and utility.

I have the honour to be,

With the highest consideration,

Sir,

Your most obedient,

humble servant,

JAMES BRYCE.

## LIST OF MEMBERS

### HONORARY MEMBERS.

Asser, T. M. C., Minister of State, The Hague, The Netherlands.  
Holland, Thomas E., Oxford University, Oxford, England.  
Lammasch, Heinrich, University of Vienna, Vienna, Austria.  
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### LIFE MEMBERS.

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